(16,389.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 239.

JAMES JOHNSON, PLAINTIFF IN ERROR,

vs.

GEORGE F. DREW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from circuit court of county of Hillsborough	1	1
Præcipe for summons	2	1
Memorandum as to loss of summons	2	1
Declaration	3	2
Plea	5	3
Demurrer to plea	8	4
Notice of hearing on demurrer	10	5
Amended plea	11	5
Order denying leave to file amended plea	15	7
Joinder in demurrer	15	7
Order sustaining demurrer	16	8
Charge to jury	18	8
Plaintiff's requests for instructions	20	9
Defendant's requests for instructions	21	10
Verdict	25	11
Motion for a new trial	26	12
Order overruling motion for new trial	28	13
Judgment	29	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1897.

	Original.	Print.
Bill of exceptions	31	14
United States patent to Louis J. Brush, September 30, 1882	32	14
Objections to foregoing patent	33	15
Deed from Louis J. Brush *et ux.* to Geo. F. Drew, April 23, 1883	36	16
Plaintiff rests	41	19
Transcript from records of General Land Office, "A"	41	19
Commissioner's certificate	41	19
Letter, Secretary of War to Secretary of Interior, July 24, 1860	42	19
Letter, Quartermaster General to Secretary of War, July 13, 1860	43	19
Letter, Secretary of War to Secretary of Interior, April 6, 1870	44	20
Letter, Secretary of War to Secretary of Interior, January 4, 1883	45	20
Letter, Secretary of War to Secretary of Interior, March 8, 1883	46	21
Objections to foregoing transcript	47	21
Transcript from records of General Land Office, "B"	48	22
Commissioner's certificate	48	22
Letter, Secretary of War to President, January 22, 1877	49	22
Endorsement of President Grant, January 22, 1877	50	22
Letter, Secretary of War to President, May 29, 1878	50	23
Endorsement of President Hayes, May 29, 1878	52	23
Objections to foregoing transcript	53	23
Diagram of the relinquished reservation, "C"	54	24
Objections to foregoing diagram	54	24
Testimony of E. B. Chamberlain	55	25
James Johnson	63	28
Daniel Walker	68	30
John Patton	71	32
Deed from Geo. F. Drew *et ux.* to Walter B. Clarkson, December 13, 1885	73	33
Defendant rests	79	36
Charge to jury	80	36
Defendant's requests for instructions	82	37
Further charge to jury	85	38
Verdict	87	39
Motion for new trial	88	40
Judgment	91	41
Judge's certificate to bill of exceptions	92	41
Petition for appeal	92	42
Bond on appeal	93	42
United States patent to Louis J. Brush, September 30, 1882	96	43
Deed from Louis J. Brush *et ux.* to Geo. F. Drew, April 23, 1883	99	45
Transcript from records of General Land Office, "A"	105	47
Commissioner's certificate	105	47
Letter, Secretary of War to Secretary of Interior, July 24, 1860	106	48
Letter, Quartermaster General to Secretary of War, July 13, 1860	106	48

	Original.	Print.
Letter, Secretary of War to Secretary of Interior, April 6, 1870	107	48
Letter, Secretary of War to Secretary of Interior, January 4, 1883	108	48
Letter, Secretary of War to Secretary of Interior, March 8, 1883	110	49
Transcript from records of General Land Office, "B"	111	50
Commissioner's certificate	111	50
Letter, Secretary of War to the President, January 22, 1877	112	50
Endorsement of President Grant, January 22, 1877	113	50
Letter, Secretary of War to the President, May 29, 1878	113	51
Endorsement of President Hayes, May 29, 1878	115	51
Clerk's certificate	116	52
Petition of appeal and assignment of errors	117	52
Order taking cause under advisement	121	54
Judgment	121	54
Opinion	123	54
Head-notes to opinion	143	64
Clerk's certificate	146	65
Bond	147	66
Assignment of errors	149	67
Clerk's certificate	156	71
Writ of error	157	71
Citation	160	72
Proof of service of citation	162	73
Proof of service of citation	163	73
Clerk's certificate	164	73

1 Be it remembered that on the 14th day of January, A. D. 1890, at a regular term of the supreme court of the State of Florida, came the appellant, James Johnson, by counsel, and filed in the clerk's office of the supreme court of Florida a transcript of the record of the proceedings and judgment of the circuit court of Florida for Hillsborough county in a certain cause wherein George F. Drew was plaintiff and James Johnson was defendant, and of the appeal herein from the judgment of the circuit court therein rendered; which said transcript of the record of the cause aforesaid and subsequent proceedings to judgment and appeal therefrom is in the words and figures as follows, to wit:

Pleas in the circuit court of the State of Florida for the sixth judicial circuit in and for the county of Hillsborough, in a certain cause therein wherein George F. Drew is plaintiff and James Johnson is defendant.

Be it remembered that on the ——, in the year of our Lord one thousand eight hundred and eighty-six, came George F. Drew, plaintiff in the cause aforesaid, by Sparkman and Sparkman, his attorneys, and filed in the clerk's office of the circuit court aforesaid his præcipe for a *summons ad respondendum* in the words and figures—follows, to wit:

2 In the Circuit Court, 6th Judicial Circuit, of the State of Florida in and for the County of Hillsborough, State of Florida.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

The clerk of the circuit court will please issue *summons ad respondendum* for the defendant in the above-entitled cause, returnable to the rule day in October, A. D. 1886, and oblige,

SPARKMAN & SPARKMAN,
Att'ys for Plaintiff.

Whereupon a *summons ad respondendum* issued from the clerk's office aforesaid, which, with the return and indorsement thereon, is in the words and figures following:
(Summons herein misplaced or lost.)

And afterwards, to wit, on the 24th day of September, in the year of our Lord one thousand eight hundred and eighty-six, the
3 plaintiff, by his attorneys, filed in the clerk's office aforesaid his declaration in the words and figures following, to wit:

In the Circuit Court, 6th Judicial Circuit, of the State of Florida in and for the County of Hillsborough, State of Florida.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

Statement Containing a Description of the Property and the Amount Claimed on Account of Mesne Profits and of Whom Claimed.

Description of property:

Lot eight (8) of section nineteen (19), in township twenty-nine (29) south, of range nineteen (19) east, and lot seven (7) of section twenty-four (24), in township twenty-nine (29) south, of range eighteen (18) east, containing forty and nineteen one-hundredths (40.19) acres.

Amount claimed on account of mesne profits and of whom claimed:

One hundred dollars per annum, from the first of January, A. D. 1883, claimed of the defendant, James Johnson.

SPARKMAN & SPARKMAN,
Att'ys for Plaintiff.

4 In the Circuit Court, 6th Judicial Circuit, in and for Hillsborough County, State of Florida.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

George F. Drew, by Sparkman & Sparkman, his attorneys, complains of James Johnson, who has been summoned to answer him in an action of ejectment, for that whereas the defendant is in possession of a certain tract or parcel of land situate, lying, and being in said county known and described as follows, to wit:

Lot eight (8) of section nineteen (19), township twenty-nine (29) south, of range nineteen (19) east, and lot seven (7) of section twenty-four (24), in township twenty-nine (29) south, of range eighteen (18) east, containing about forty and nineteen one-hundredths (40.19) acres, to which said plaintiff claims title, and the defendant has received the profits of said land since the first day of January, A. D. 1883, and of the yearly value of one hundred dollars, and refuses to deliver the possession of said land to the said plaintiff or to pay him the profits thereof.

SPARKMAN & SPARKMAN,
Att'ys for Plaintiff.

5 (Endorsed:) George F. Drew *vs.* James Johnson. Declaration, præcipe, and statement containing description of property, amount of mesne profits, and of whom claimed. Filed Sept. 24, 1886. W. A. Givens, clerk c't ct.

And upon the — day of ——, in the year of our Lord one thousand eight hundred and eighty-six, the defendant, by his attorneys,

Lucius Finley and J. J. & S. Y. Finley, entered his appearance herein, and afterwards, to wit, on the first day of November, in the year of our Lord one thousand eight hundred and eighty-six, the said defendant, by his attorneys, filed in the clerk's office aforesaid his plea in the words and figures following:

In the Circuit Court, Sixth Judicial Circuit, of Florida, Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

And now comes the said defendant, by Lucius Finley and J. J. & S. Y. Finley, his attorneys, and defends the wrong and injury when, &c., and for plea herein says:

6 1st. That he is not guilty as the plaintiff in his declaration has alleged; and of this he puts himself upon the country.

2nd. And for a second plea herein, upon equitable grounds, the defendant says that the said plaintiff ought not to have and maintain his aforesaid action against him, because he says that the land mentioned in the plaintiff's claim — title is situated upon and within a military reservation of the United States known as the Fort Brooke military reservation, at Tampa, Florida, in the State of Florida.

That the plaintiff claims title to the land in question through a pretended patent issued through the Land Department of the U. S., upon an application made to the land office at Gainesville, Florida, by one Louis J. Brush, based upon Valentine scrip; that the location of said land with Valentine scrip and the issuance of the patent thereon was in violation of the act of the Congress of the U. S. authorizing, limiting, and defining the land subject to such entry or location and the manner of its location; that said land was not at the time of such location of such a character and situation as was authorized by said act of Congress to be so located, and that said land was at the time of the location of said scrip upon it as aforesaid and of the issuance of said patent within the jurisdiction of the War Department of the U. S. and withheld from the Land Department of the Government by the act of the Congress of the U. S. in such case made and provided and was not subject to the entry and location aforesaid; and the defendant alleges and charges

7 that said patent upon which the plaintiff claims title is in fraud of and in violation of the acts of the Congress of the United States in such cases made and provided and void; that the plaintiff herein is not an innocent purchaser from said Louis J. Brush, the pretended patentee, but knew all about the manner of the location of said scrip as aforesaid at the time of his pretended purchase of said land from said Brush.

LUCIUS FINLEY AND
J. J. & S. Y. FINLEY,
Def't's Att'ys.

STATE OF FLORIDA,
County of Hillsborough.

Personally appeared before me James Johnson, the above-named defendant, who, being duly sworn, upon oath says that the foregoing pleas are true in substance and in fact.

his
JAMES x JOHNSON.
mark.

Sworn and subscribed before me this the 1st day of November, 1886.

W. A. GIVENS,
Clerk Circuit Court.

Endorsed on back: In the circuit court, Hillsborough county, Florida. George F. Drew *vs.* James Johnson. Plea in ejectment. Filed Nov. 1st, 1886. W. A. Givens, cl'k ct. ct.

8 In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for the County of Hillsborough.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

Now comes the plaintiff, by his attorneys, Sparkman & Sparkman, and says that the defendant's second plea, entitled a plea on equitable grounds, is not sufficient in law:

First. Because it sets up no sufficient defense to the plaintiff's cause of action.

Second. Because said plea does not show any grounds for the interposition of a court of equity in his behalf.

Third. Because said defendant does not show that he has any title, legal or equitable, to the said land.

Fourth. Because defendant does not show by his said plea what, if any, right, title, or interest he has in or to the said land.

Fifth. Because defendant by his said plea does not show why said land could not be entered by said Brush with Valentine scrip.

Sixth. And for other good and sufficient reasons apparent on the face of said plea.

(Signed) S. M. & G. B. SPARKMAN,
Att'ys for Pl'ffs.

9 I, Stephen M. Sparkman, one of the attorneys for the said plaintiff, do hereby certify that the foregoing demurrer is, in my opinion, well founded in law.

S. M. SPARKMAN.

STATE OF FLORIDA,
Hillsborough County.

Before me, Douglas F. Conley, a notary public for the State of Florida at large, personally appeared S. M. Sparkman, who, being

duly sworn, deposes and says that the foregoing demurrer is not interposed for the purpose of delay.

S. M. SPARKMAN.

Sworn to and subscribed before me this the 5th day of October, 1889.

[SEAL.] DOUGLAS F. CONLEY.

Demurrer sustained. Filed. Defendant excepts. Jan. 28, 1889.

G. A. HANSON, *Judge.*

10 In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for the County of Hillsborough.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

To James Johnson or Lucius, J. J., and S. Y. Finley, his attorneys:

You will please take notice that we have set down for hearing the demurrer to defendant's plea on an equitable ground in the above-entitled cause, at the office of the Honorable H. L. Mitchell, judge of the sixth judicial circuit of Florida, on Monday, the 10th day of the present month, at 11 o'clock a. m., or as soon thereafter as will be convenient for the said court to hear the same.

SPARKMAN & SPARKMAN.

Endorsed on back: Notice to defendant in matter of Drew *vs.* James Johnson. Sparkman & Sparkman, att'ys for pl't'ff.

11 In the Circuit Court, Sixth Judicial Circuit, of Florida, Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

Amended Plea.

And now comes the said defendant, by Lucius Finley and S. Y. Finley, his attorneys, and by leave of the court amends his second plea hitherto filed in this cause upon equitable grounds and says for further plea herein upon equitable grounds that the said plaintiff ought not to have and maintain his aforesaid action against him, because he says that the land in question sued for by the plaintiff in this cause and to which the plaintiff claims title in this action is situated within the Fort Brooke military reservation of the United States, at Tampa, in the State of Florida; that the plaintiff claims title to said land under and by virtue of a patent predicated upon a pretended location and entry of the land in question at the land office of the United States at Gainesville, Florida, by one Louis J. Brush, the grantor of the plaintiff, with Valentine scrip; that at the

time of the location of said land and the entry thereof as
12 aforesaid by the plaintiff grantor with Valentine scrip, as
aforesaid, and at the time of the issuance of said patent to said Brush, the grantor of the plaintiff, the defendant herein was in actual occupancy and possession of said land, residing on the same with his family as his home; that the defendant herein settled upon and was in actual occupancy of said land at the time of the aforesaid entry of said land by the plaintiff's grantor and at the time of the issuance of said patent to the plaintiff grantor, and that the said defendant was settled upon and was in the actual possession of said land, it being a portion of said Fort Brooke military reservation, prior to the location of said reservation, in the year A. D. 1877, and prior to the location of said reservation upon said reservation, in the year A. D. 1878, and had settled thereon prior to January 1st, A. D. eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws of the United States and has continued in such occupany from a period prior to the first day of January, A. D. 1884, to the time of the passage and approval of the act of Congress approved July 5th, A. D. 1884, and is by law entitled to make a homestead entry and is by law entitled to enter said land, and in equity and good conscience this defendant is entitled to the exclusive right of possession thereof; that at the time of the pretended entry and location of said land with Valentine scrip, as aforesaid, by plaintiff grantor as aforesaid and at the time of the issuance of said patent to the grantor of the plaintiff
said land was occupied by the defendant as aforesaid and was
13 at the time last aforesaid appropriated, and was not then and
is not now unoccupied and unappropriated public land of the United States, as required, specified, and limited by the act of Congress in such case made and provided in authorizing the location of such scrip; that at the time of the pretended entry and location of said land by the plaintiff grantor and of the issuance of said patent said land, as the defendant is informed and believes, had not been surveyed under the direction and control of the General Land Office of the United States, and that said location and entry of said land by the plaintiff grantor was made upon tracts less than the subdivisions provided for in the United States land laws and did not conform to the general system of the United States land surveys; that said land was at the time of the location thereof and entry thereof with Valentine scrip by the plaintiff grantor and of the issuance of said patent to him within the jurisdiction of the War Department of the United States and not within the Land Department of the United States, and the defendant herein alleges and charges that the said patent upon which the plaintiff claims title is in fraud and violation of the acts of the Congress of the United States and of the rights of this department claimed herein under and by virtue of said acts of Congress in such case made and provided, and defendant avers that said patent is void and vests no legal nor equitable title nor right of possession in and to said land nor in any part thereof to the plaintiff; that this defendant, under and by virtue of the aforesaid acts of the Congress of the United

States in such case made and provided and in equity and
14 good conscience, is entitled to the exclusive possession of the land mentioned in the plaintiff's declaration.

LUCIUS FINLEY AND
S. Y. FINLEY,
Attorneys for the Defendant.

STATE OF FLORIDA,
Hillsborough County.

Personally appeared James Johnson, the above defendant, who, being duly sworn, upon oath says that the foregoing plea is true.

his
JAMES x JOHNSON.
mark.

Sworn to and subscribed before me this Jan'y 26th, A. D. 1889.
[SEAL.] CHARLES E. JOHNSON,
Notary Public for the State of Florida at Large.

Attest: E. T. HARRISON.

Endorsed: In the circuit court, 6th judicial circuit, of Florida, Hillsborough county. George F. Drew *vs.* James Johnson.

15 *Amended Plea.*

Upon motion for leave to file the foregoing plea, the plaintiff's counsel appearing, it is ordered by the court that leave to file be denied on the ground that the plea is not sufficient as a plea on equitable grounds; to which defendant excepts.
Jan'y 28, 1889.

G. A. HANSON, *Judge.*

And, afterwards, on the 28th Jan'y, 1889, the defendant filed his joinder in demurrer in the words and figures as follows:

In the Circuit Court, Sixth Judicial Circuit, of Florida, Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON.

And the said defendant says that the equitable pleas filed by him are sufficient in law.

LUCIUS FINLEY AND
S. Y. FINLEY,
Att'ys for Def't.

16 And afterwards, to wit, on Jan'y 28, 1889, after due notice given, the said demurrer came on to be heard before the Hon. G. A. Hanson, judge of said circuit court, and after argument thereon the following judgment upon the demurrer was rendered:

In the Circuit Court, 6th Judicial Circuit, of Hillsborough County.

LOUIS J. BRUSH *vs.* JAMES JOHNSON. } Ejectment.

GEORGE F. DREW *vs.* JAMES JOHNSON. } Ejectment.

And now come the parties in said cause, and, the same coming on to be heard upon the plaintiff's demurrer in each of said cases to the defendant's equitable pleas therein, after argument by counsel, it is considered, ordered, and adjudged that the demurrer in said cause be sustained; to which ruling and decision the defendant, by counsel, excepts.

Jan. 28, 1889.

G. A. HANSON, *Judge.*

17 Endorsed: In the circuit court, 6th judicial circuit, of Florida, Hillsborough county. Louis J. Brush *vs.* James Johnson & George F. Drew *vs.* James Johnson. Order sustaining demurrers to equitable pleas. Filed Jan'y 28, 1889. W. A. Givens, clerk circuit court.

18 GEORGE F. DREW *vs.* JAMES JOHNSON. } Ejectment.

GENTLEMEN OF THE JURY: This is an action of ejectment, by which the plaintiff seeks to recover possession of a certain tract of land, as described in the pleading, which he claims is wrongfully withheld from him. The defendant pleads not guilty, thereby forming the issue you are to try.

In order to recover, the plaintiff must show that he, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within seven years next before the commencement of this action, and must recover, if at all, on the strength of his own title and not upon the weakness of defendant's title; but in every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been *passed* thereof within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appears that such premises have been held and possessed adversely to such legal title for seven years before the commencement of the suit or action for recovery.

An adverse possession is defined to be either when a party enters into possession of the premises under a claim of title ex-
19 clusive of all rights, founding such claim upon a written instrument as a conveyance, and actually *contains* in possession of the premises in question when such possession is based on the decree or judgment of a competent court, or if not founded

upon a color of title by written instrument or the decree or judgment of a competent court the premises shall be deemed to have been possessed and occupied only in the following cases: First, when it has been protected by a substantial enclosure, or, *secured*, when it has been usually cultivated or improved, and in case the *passion* shall be continuous. You have heard the evidence, and you are judges as to its weight and also judges as to the credibility of the witnesses, and it is your duty to consider all the facts and make up your verdict accordingly.

If you find for the plaintiff, it is your duty to find the quantity of his estate and the description of the land, and the form of your verdict should be, We, the jury, find for plaintiff (and state the quantity of estate and describe the land by its numbers or as described in the declaration); so say we all; and let one of your number sign as foreman.

If you find for the defendant, the form of your verdict should be, We, the jury, find for the defendant; so say we all; and let your foreman sign it.

20 In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

Plaintiff's counsel asks the court to instruct the jury as follows:

1st. That a patent from the Government of the United States is the highest evidence of title and is conclusive as against the Government and all persons claiming under title acquired since the issuing of the patent until set aside or annulled or unless it is absolutely null and void.

2nd. That in a suit of ejectment the holder of such a patent must prevail as against all other persons not having a legal title older than such patent.

3rd. And you are instructed that bare possession by a person of a tract of land at the time of the issuing of the patent to another person does not create any right in the person so in possession as against the patent held by such other person.

4th. That if the jury believes from the evidence in this case that the plaintiff holds a patent from the Government of the United States for the land in controversy or is the grantee of a party who so held a patent for the land from the Government of the United States, that they must find for the plaintiff unless defendant
21 has produced in evidence a prior patent or a legal title of a date prior to the issuing of the patent to the plaintiff or his grantee.

5th. That the bare possession of the defendant, although he may have been on the land prior to the issuing of the patent, does not entitle him to come into a court of law and defend as against said

patent, nor does he by said possession acquire such right as would entitle him to question the legality of such patent.

Given under the pleadings and evidence in this case Sept. 28th, 1889; to all of which defendant excepts.

Signed, sealed, and made a part of the record.

G. A. HANSON,
Judge, 6th Circ.

In the Circuit Court, Sixth Judicial Circuit, of Florida, Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

The defendant's counsel ask the court to charge the jury as follows:

1st. That in an action of ejectment plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of that of the defendant.

Given.

22 2nd. In this action before the plaintiff can recover it must be shown by the evidence not only that the title to the land in question at the commencement of this suit was in the plaintiff, but that the plaintiff *bat* at that time and now at the time of the trial has the right of possession of the land in question and the title thereto.

Refused.

3rd. If you find from the evidence that the plaintiff had parted with the title to the land in question or any portion thereof, the plaintiff would not be entitled *to* this action to recover for any portion of the land so conveyed by the plaintiff to any one else before the commencement of this suit or since that time.

Refused.

4th. If you find from the evidence that the plaintiff *deserves* title from Louis J. Brush, and that Louis J. Brush procured a patent from the United States for the land in question by the location of Valentine scrip thereon and the purchase thereof with Valentine scrip, and if you further find from the evidence that at the time of such location and purchase of the said land by the said Brush that the said land was in the actual possession of the defendant, and that the defendant was then occupying the same as his home openly and notoriously, claiming and cultivating and improving the same and exercising ownership thereof, then in such case the court charges you that such location and purchase of said land with Valentine scrip would be illegal and, as against the defendant in possession, would not *rest* in said Brush or in the plaintiff, claiming under him, either the title or right of possession in and to the land in question, and you should find for the defendant.

Refused.

23 5th. If you find from the evidence that the plaintiff claims title through a patent issued to Louis J. Brush, and if you

further find that said patent was obtained with Valentine scrip, located upon said land with same scrip by said Brush, and if you further find from the evidence that at the time of such location of said land with Valentine scrip said land was not unappropriated public land of the United States, then such patent would be illegally issued and would convey no title or right of possession to said Brush or to the plaintiff claiming under him.

Refused.

6th. If you find from the evidence that the patent upon which the plaintiff relies was illegally issued by the office of the Land Department in violation of the act of Congress in such cases made and provided, and that the defendant was in the actual occupation of said land and settled thereon prior to January 1st, 1884, in good faith for the purpose of securing a home and entering the same under the general land laws of the United States and has continued in such occupation up to and including the 5th of July, 1884, and up to the present time and is by law entitled to make a homestead entry, and that said land is a part of the Fort Brooke military reservation, at Tampa, Florida, and that said lands were subject to entry under the public land laws at the time of their withdrawal, then you should find for the defendant.

Refused.

The first charge given; the 2nd, 3rd, 4th, 5th, and 6th refused as not applicable to the evidence in this case and because calculated to confuse or mislead the jury; to which ruling defendant
24 excepts. Sept. 28, 1889.

Signed, sealed, and made a part of the record.

G. A. HANSON,
Judge 6th Circuit.

Endorsed: In the circuit court, 6th judicial circuit, of Florida, Hillsborough county. George F. Drew *vs.* James Johnson. Ejectment. Charge. Excepted — by def't's counsel. Filed Sept. 28th, 1889. W. A. Givens, clerk, by W. J. Allen, D. C.

25 And afterwards, on the 27th day of Sept., in the year of our Lord one thousand eight hundred and eighty-nine, at a term of the circuit court of the sixth judicial circuit in and for the county aforesaid, held at the —, came the said plaintiff and the said defendant, by their respective attorneys, and thereupon came a jury, to wit:

1. William T. Mears,	4. F. M. Branch,
2. C. L. Wilder,	5. W. R. Beckett,
3. J. J. O. Jackson,	6. E. C. Blanton,

who, being duly elected, tried, and sworn the truth to speak upon the issues joined, having heard the evidence, the charge of the court, and the argument of counsel, and having considered of their verdict, upon their oaths do say:

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

We, the jury, find that the plaintiff has a fee-simple estate in the following-described lands, situate, lying, and being in the county of Hillsborough and State of Florida, to wit, the lot numbered eight (8) of section nineteen (19), in township twenty-nine (29) south, of range nineteen (19) east, and the lot numbered seven of section twenty-four (24), in township twenty-nine (29) south, of range eighteen (18) east, containing forty and nineteen one-hundredths of an acre, and that the said plaintiff, George F. Drew, is en-
26 titled to the possession of the above-described land.

So say we all.

(Signed) C. L. WILDER, *Foreman.*

And the said defendant, by his attorney, then and there at the term of court aforesaid, did enter in writing and submit to the said court his motions that the said verdict be set aside and that a new trial be granted in words and figures following:

In Circuit Court, 6th Judicial Circuit, of Florida, Hillsborough County, Fall Term, 1889.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

Plaintiff's counsel will please take notice that defendant, by his counsel, will move the court as soon as we can be heard for a new trial in the above-entitled cause upon the following grounds:

1. Because the verdict of the jury is contrary to the evi-
27 dence and to the charge of the court in said cause.

2. Because the court erred in refusing to give the jury the charges asked by the defendant's counsel numbers 2, 3, 4, 5, & 6—charges for the defendant.

3. Because the court erred in giving the charges asked by the plaintiff's counsel numbers 1st, 2d, 3d, 4th, and 5th.

4. Because the court erred in admitting in evidence the patent to Louis J. Brush, it appearing on the face of said patent that it was obtained with and predicated upon Valentine scrip, and that said land is a part of the Fort Brooke military reservation, at Tampa, Florida.

5. Because the court erred in refusing to allow the defendant to prove that at the time of the location of the land in question and the issuance of the patent to Louis J. Brush said land was not unoccupied public land of the United States, but was then in the open and undisputed occupancy by the defendant of the same, occupying the same as his home, and that he has continued in such occupation of the same continuously from that time until the trial of this suit.

6. Because the court erred in refusing to allow the defendant to

prove that he was in the actual occupation of said land prior to the 1st day of Jan'y, A. D. 1884, and had before said date settled upon the said land in good faith, with intent to secure the same under the public land laws of the United States, and had continued in such occupation up to and including the 5th day of July, A. D. 1884, the time of the passage of the act of Congress, July 5, A. D. 1884, and had continued in such occupation up to the trial of this suit.

28 7. Because the court erred in refusing to allow the defendant to prove that the plaintiff have parted with the title to said land prior to the commencement of this suit, and that at the time of the trial of this suit all the title which the plaintiff claims under the patent to Louis J. Brush had been conveyed by the plaintiff to one Walter B. Clarkson, and that at the time of the said trial there was no title or right of possession in said land in the plaintiff.

LUCIUS FINLEY AND
S. Y. FINLEY,
Att'ys for Def't.

Sept. 28, 1889.

Motion overruled Sep. 28, 1889. Defendant excepts.
G. A. HANSON,
Judge 6th Circuit Court.

Which said motion being considered by the court upon the hearing thereof on the 28th day of September, A. D. 1889, at the term aforesaid, an order was then made by said court overruling and denying said motion in the words and figures as follows, to wit:

Motion overruled Sept. 28, 1889. Defendant excepts.
G. A. HANSON,
Judge 6th Circuit Court.

29 Whereupon judgment upon the said verdict was entered by the court in the words and figures following, to wit:

Whereupon the court aforesaid on the 28th day of September, A. D. 1889, at the term aforesaid, did render judgment in favor of the said plaintiff and against the said defendant in words and figures as follows, to wit: It is therefore ordered and adjudged by the court that in accordance with the said verdict the said George F. Drew, plaintiff, do have and recover of and from the said defendant, James Johnson, in fee-simple, possession of the following-described lands, situate, lying, and being in the county of Hillsborough and State of Florida, to wit: The lot numbered eight (8) of section nineteen (19), in township twenty-nine south, of range nineteen (19) east, and the lot numbered seven of section twenty-four (24), in township twenty-nine (29) south, of range (18) east, containing forty and nineteen one-hundredths acres; it is further ordered and adjudged that the said plaintiff, George F. Drew, do have and recover of and from the said defendant, James Johnson, the sum of — dollars and — cents for his costs in this behalf laid out and expended, which said

judgment appears of record, and inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the verdict and judgment aforesaid, the said defendant, by his counsel aforesaid, did on the — day of November, A. D. 1889, after the expiration of the term of court aforesaid, by virtue of a special order herein made, propose this
30 his bill of exceptions to the said opinions and decisions of the said judge and request him to sign the same according to the form of the statute in such case made and provided, which is done this 19th day of November, A. D. 1889.

G. A. HANSON, [SEAL.]
Judge of the Circuit Court, Sixth Judicial Circuit of Florida.

And after the expiration of said term, to wit, on the 19th day of November, in the year of our Lord one thousand eight hundred and eighty-nine, by virtue of a special order to that effect made, the said defendant made up and tendered his bill of exceptions, which was settled and signed by the judge and ordered to be made a part of the record; which said bill of exceptions is in the words and figures following, to wit:

31 In the Circuit Court of Florida, Sixth Judicial Circuit, in and for Hillsborough County, Fall Term, A. D. 1889.

Be it remembered that — a term of the circuit court of the sixth judicial circuit of Florida for the county of Hillsborough, held at Tampa on the 27th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, a cause therein pending, wherein George F. Drew was plaintiff and James Johnson was defendant, came on to be heard before the Honorable G. A. Hanson, judge of the said circuit court, at which day came the said parties, by their respective attorneys; and thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called likewise, came and were sworn to try the said issues in manner aforesaid joined; and thereupon the following proceedings, embracing all the evidence in said cause, were had and taken:

The plaintiff, to maintain the issues on his part, offered in evidence a patent from the United States Government to Louis J. Brush for the land in controversy in words and figures as follows:

32 The United States of America to all — whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress approved April 5, 1872, entitled An act for the relief of Thomas B. Valentine, there has been deposited in the General Land Office special certificate of location, E. No. 265, for forty acres, in favor of Thomas B. Valentine, with evidence that the same has been duly located upon the lot numbered eight of section nineteen, in township twenty-nine

south, of range nineteen east, and the lot numbered seven of section twenty-four, in township twenty-nine south, of range eighteen east, of Tallahassee meridian, in the district of lands subject to sale at Gainesville, Florida, containing forty acres and nineteen-hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, the said special certificate of location having been assigned by the said Thomas B. Valentine to Louis J. Brush, in whose favor said tract has been located:

Now, know ye that there is therefore granted by the United States unto the said Louis J. Brush, assignee as aforesaid, and to his heirs, the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Louis J. Brush, as assignee as aforesaid, and to his heirs and assigns forever. This patent is issued in lieu of an erroneous one dated August 10, 1882, which has been cancelled.

33 In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

By the President:

CHESTER A. ARTHUR,
By O. S. JUDD, *Ass't Secretary.*

[Seal of the General Land Office.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded, vol. 1, page 69.

Whereupon defendant's counsel objected to the admission of said patent in evidence upon the grounds:

1st. That said patent shows upon its face that it was entered with or predicated upon Valentine scrip.

34 2nd. That the patent shows upon its face the numbers, location, and description of the land in question, and from that description and from the Government surveys the court will take judicial cognizance that it is situate in what is known as the Fort Brooke military reservation. We claim that under the legislation of Congress and under the practice and decisions of the Land Department of the Government, as well as the various decisions of the judiciary department, and that, too, by the highest court known to the country, the Supreme Court of the United States, Valentine scrip is not locatable upon the land described in the plaintiff's declaration.

3rd. That the act of Congress of 1872 which authorized the issuance of Valentine scrip limited it and prescribed that when located upon lands it should conform in the survey to the General

Government survey, provided that when application in any specific instance was made to locate Valentine scrip and the land was not surveyed that it should conform when surveyed to the general regulations of Government surveys. We claim that this patent and these surveys show that this land described in plaintiff's declaration, while it is contiguous, while it is all in one body, a very large part of these lands are not only in different sections and in different quarter sections and in different forties, but they are in different ranges, though in the same township, so that we object to the admission of this patent because it is not in conformity with the limitation prescribed by the Government for the issuance of Valentine scrip.

35 4th. That upon the plea of the general issue, which at this stage of the case is the only plea standing, your honor having precluded the equitable plea, the possession of the defendant is admitted.

5th. We further object to the admission of this patent on the grounds, as we claim, that possession means occupancy; that the words are synonymous. By the act of Congress which created Valentine scrip, authorized it to issue, the very act of Congress itself provides that it may be located upon any unoccupied, unappropriated public land, not mineral.

6th. We contend and make it an objection that this patent is in violation upon its face of the act of Congress which creates it.

Objections overruled on the ground that where the Government issues a patent it is not void but simply voidable.

To which said ruling of the court defendant, by his counsel, then and there excepts.

Said patent admitted in evidence and read to the jury by plaintiff's counsel.

Plaintiff's counsel then offer in evidence deed from Louis J. Brush and wife to George F. Drew, which is admitted in evidence

36 without objection from defendant's counsel and is read to the jury.

Which deed is in words and figures as follows:

This indenture made the 23rd day of April in the year of our Lord one thousand eight hundred and eighty-three between Louis J. Brush and his wife, Margaret H. Brush, of the county of Madison and State of Florida, of the first part and George F. Drew, of the same county and State, of the second part,

Witnesseth that the said parties of the first part for and in consideration of the sum of one dollar lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part and his heirs and assigns, forever, all the tract of land lying and being in

the county of Hillsborough and State of Florida, described as follows:

On a patent from the United States Government dated at Washington, D. C. Sept. 13, A. D. 1882, to wit:

The lot numbered eight of section nineteen in township twenty-nine south of range nineteen east, and the lot numbered seven of section twenty-four in township twenty-nine south of range eighteen east of Tallahassee meridian in the district of lands subject to
37 sale at Gainesville, Florida, containing forty acres and nineteen-hundredths of an acre. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents issues and profits thereof; and also all the estate, right, title and interest, dower and right of dower, separate estate, property and possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in and to the same, and every part and parcel thereof, with the appurtenances:

To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to their own proper use, benefit and behoof forever.

And the said parties of the first part for themselves and for their heirs, executors and administrators, do covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said parties of the first part at the time of the sealing and delivery of these presents, *is* lawfully seized in fee-simple of a good, absolute and indefeasible, estate of inheritance, of and in all and singular, the above granted, bargained, and described premises, with the appurtenances, and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the
38 above-granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said parties of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same, and that the same are now, free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature and kind soever and that the said parties of the first part for themselves, and their heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto said party of the second part, his heirs and assigns, and against the said parties of the first part, and his heirs, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seal the day and year first above written.

(Signed) LOUIS J. BRUSH. [SEAL.]
(Signed) MARGARET H. BRUSH. [SEAL.]

Signed, sealed, and delivered in the presence of us—

E. T. CLARK.
F. E. RANKIN.

39 STATE OF FLORIDA, }
County of Madison. }

Know all men by these presents that I, Margaret A. Brush, wife of the above-named Louis J. Brush, do by these presents, made and executed by me, separate and apart from my said husband and in the presence of Geo. Clark, a justice of the peace of the State of Florida, acknowledge and declare that I did make myself a party to and executed the foregoing deed of conveyance for the purpose of relinquishing all my right of dower in and to the lands in said conveyance therein described and granted, and that I did the same freely and voluntarily and without any compulsion, constraint, apprehension, or fear of or from my said husband.

In witness whereof I hereunto subscribe my name and affix my seal this — day of ——, A. D. one thousand eight hundred and —.

MARGARET H. BRUSH. [SEAL.]

40 STATE OF FLORIDA, }
County of Madison. }

To all whom it may concern:

Be it remembered that on this twenty-third day of April, A. D. 1883, personally appeared before me, a justice of the peace of the State of Florida, the above-named Margaret A. Brush, to me well known as the wife of Louis J. Brush and as one of the persons described in and who executed the foregoing deed of conveyance, who, being at the time separate and apart from her husband, the said Louis J. Brush, did then and there make and execute the foregoing acknowledgment, her name being with her own hand subscribed and her seal affixed in my presence.

Witness my hand and seal at Ellaville, Fla., the day and year above written.

GEO. CLARK, *J. P.* [SEAL.]

STATE OF FLORIDA, }
County of Hillsborough. }

Be it remembered that on the seventh day of May, A. D. 1883, I, William C. Brown, clerk of the circuit court in and for said county, have duly filed and recorded the foregoing deed in the public records of the said county, in Book "G," pages 796, '97, '98, & '99.

In witness whereof I hereunto set my hand and the seal of said court this 21st day of May, A. D. 1883.

[SEAL.]

WM. C. BROWN,
By H. F. CRANE, *D. C.*

41 And the said plaintiff then rested.

Thereupon the said defendant, to maintain the issues on his part, produced and offered in evidence a certain transcript of the records of the General Land Office of the Department of the Interior, at Washington, giving the history of the Fort Brooke military reservation, at Tampa, Florida, under the certificate of the Hon. William A. J. Sparks, Commissioner of the General Land Office, dated Washington, D. C., April 15th, 1885, under the seal of the General Land Office, officially sealed and attached, which is in words and figures as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 15, 1885.

I, William A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copies of letters from the Secretary of War to the Secretary of the Interior, dated respectively July 24, 1860, with (inclusive), January 4 and March 8, 1883, and of copy of letters from the Secretary of War to the Secretary of the Interior, dated April 6th, 1870, are true and literal exemplifications of the original letters and official copy on file in this office.

42 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on this day and year above written.

[Seal of General Land Office.]

WILLIAM A. J.ª SPARKS,
Commissioner of General Land Office.

WAR DEPARTMENT, *July 24th*, 1860.

SIR: Referring to the correspondence between the two departments on the subject, I have the honor to enclose to you a report of the quartermaster general showing that Fort Brooke is now in readiness to be turned over to the Department of the Interior, in pursuance of the arrangements made to that effect.

Very respectfully, your obedient servant,

JOHN B. FLOYD,
Secretary of War.

Hon. J. Thompson, Secretary of the Interior.

43 Enclosure.

QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON CITY, *July* 13, 1860.

SIR: I have the honor to inform you that all the movable property at Fort Brooke, Florida, belonging to the United States has

been sold in conformity to your instructions of the 29th of March last, and that no reason now exists to my knowledge why the military reservation at that place may not, agreeably to your determination, be turned over to the Department of the Interior, under a provision of an act of Congress making appropriations for certain civil expenses of the Government for the year ending the 30th of June, 1857, approved August 18th, 1856.

Very respectfully, your obedient servant,

J. G. JOHNSTON,
Quartermaster General.

Hon. J. B. Floyd, Sec't'y of War, Washington, D. C.

44 (Copy.)

WAR DEPARTMENT, WASHINGTON CITY, *April* 6, 1870.

The honorable Secretary of the Interior.

SIR: I have the honor to reply to a letter addressed to this department by the Commissioner of the General Land Office on the 26th ultimo relative to the public lands occupied by this department for military purposes at Fort Brooke, Florida, and to inform you that there is no longer any objection to their disposition by the General Land Office under the laws governing the subject.

Very respectfully, your obedient servant,

WM. W. BELKNAP,
Secretary of War.

45 WAR DEPARTMENT,
WASHINGTON CITY, *January 4th*, 1883.

SIR: Referring to previous correspondence, particularly to your letter of August 10, enclosing a copy of a report of the Commissioner of the General Land Office in reply to department letters of July 3, 1882, respecting the transfer to the Department of the Interior of the present military reservation at Fort Brooke, Florida, which was originally transferred to that department July 24, 1860, and was subsequently reoccupied for military purposes, I have the honor to state that the public buildings and property at said reservation have been disposed of at public sale pursuant to an appraisement by a board of officers convened for that purpose under instructions from this department, such action having remained the only obstacle to the transfer to your department of the custody of this reservation, as indicated in your letter and the report of the Commissioner of the General Land Office above mentioned, and the reservation being no longer needed for military purposes, the same is hereby relinquished and transferred to the Department of the Interior in accordance with the act of August 18, 1856. It should be added that removal will at once be made of the remains of certain officers and enlisted men entered on the reservation, and that an agent of the quartermaster's department will be left in charge of the reservation for one

month from the present date, within which time it is hoped
46 the Department of the Interior will be able to assume charge thereof.

Very respectfully, your obedient servant,

ROBERT T. LINCOLN,
Secretary of War.

The honorable the Secretary of the Interior.

WAR DEPARTMENT,
WASHINGTON CITY, *March 8th*, 1883.

SIR: Referring to previous correspondence respecting the military reservation at Fort Brooke, Tampa, Florida, particularly to department letter of January 4th last, relinquishing and transferring to the Department of the Interior the reservation named, I have the honor to state that report has been made to the department by the military authorities that no agent of your department has as yet presented himself to assume charge of the reservation. I therefore beg to invite your attention to the matter and to state that the services of the quartermaster general's agent now in charge of the reservation will be continued until the 15th inst., at which date he will be discharged.

Very respectfully, your obedient servant,

ROBERT T. LINCOLN,
Secretary of War.

To the honorable the Secretary of the Interior.

47 Plaintiff's counsel object to the admission of this transcript, which is marked "A" and offered in evidence by defendant's counsel, on the following grounds:

1. That defendant has not shown or offered to show that he was in a situation or occupied a relation to the land in question as would entitle him to attack a patent issued by the Government of the United States to Louis J. Brush.

2. That the document offered is not legal or proper evidence in the cause.

3. That on its face it does not show nor does it purport to show that the patent admitted in evidence or the deed from Louis J. Brush to George F. Drew is illegal, null or void, or voidable.

4. That the certificate to the document offered does not show that it contains a complete history of the Fort Brooke military reservation at the time it contained the land in controversy.

5. That there has not yet been anything offered in evidence to show that the land in controversy ever was a part of the Fort Brooke military reservation.

Objections sustained upon the ground that it appears on the face of the letters contained in document marked "A" that they are simply matters of correspondence between officers of different departments of the Government and not records, and therefore not admissible in an issue of this kind.

48 To which said ruling of the court defendant, by his counsel, then and there excepts.

Defendant's counsel then offer in evidence document marked "B," which is a transcript of the records from the Department of the Interior and General Land Office, at Washington, embraced in the certificate of the Hon. S. M. Stockslager, Commissioner of the General Land Office, under date of March 21st, 1889, which contains the further history of the Fort Brooke military reservation, at Tampa, Florida, as of record in the General Land Office, at Washington, D. C., in words and figures as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 21, 1889.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed copies of executive orders dated January 22nd, 1877, and May 29th, 1878, setting apart certain lands at the post of Fort Brooke, Tampa, Florida, as a military reservation are true and literal exemplifications of the originals of said executive orders on file in this office.

49 In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal of General Land Office.]

S. M. STOCKSLAGER,
Commissioner of General Land Office.

6865–76. WAR DEPARTMENT,
WASHINGTON CITY, *January 22nd*, 1877.

To the President.

SIR: I have the honor to request that a military reservation at the post of Fort Brooke, Tampa, Florida, as described in the enclosed report from the commanding general department of the South, and accompanying plat, may be duly declared and set apart by the Executive.

The reservation recommended consists of three parts, as follows:

I. Tract marked "A" B. C., containing 127,417 ——.

II. Tract marked N M L K, containing ten (10) acres.

III. Right of way between tracts I and II, marked B. U. R. P.

Very respectfully, your obedient servant,

J. D. CAMERON,
Secretary of War.

50 WASHINGTON, *January 22d*, 1877.

Secretary of War—

Request- that a mil. reservation at Fort Brooke, Tampa, Florida, as described in enclosed report from the com'd'g gen. dep't South and accompanying plat may be duly set apart by the Executive.

1st endorsement.

EXECUTIVE MANSION,
WASHINGTON, *January 22d*, 1877.

The within request is approved and the reservation is made ac-

cordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

U. S. GRANT.

3009. WAR DEPARTMENT,
WASHINGTON CITY, *May 29th*, 1878.

To the President.

SIR: In accordance with recommendation of commanding general department of the South, concurred in by division com-
51 manders, I have the honor to request that a military reservation at the post of Fort Brooke, Tampa, Florida, with boundaries as hereinafter described, may be duly declared and set apart by the Executive in lieu of the lands at that post reserved by executive order dated January 22, 1887, to wit: Beginning at the intersection of the line which bounds the town of Tampa on the south with the Hillsborough river, running thence along said line which bounds the town of Tampa on the south, and in prolongation thereof north 68 degrees 45 minutes east 2,976 feet; thence north 4 degrees 28 minutes west 2,342 feet; thence north 38 degrees east 1,052 feet; thence south 52 degrees east 459.2 feet; thence south 38 degrees west 1,052 feet; thence south 4 degrees 28 minutes east 1,931 feet; thence south 5 degrees 29 minutes east 2,007.2 feet to the Hillsborough bay; thence westerly along the shore of Hillsborough bay and the shore of Hillsborough river to the place of beginning, containing 155 and one-half acres, more or less, A plat of the reservation and report and notes and survey by Lieutenant James C. Bush, 5th artillery, are enclosed herewith.

I have the honor to be, sir, with great respect,
Your obedient servant, GEO. W. McCRARY,
Secretary of War.

52 WAR DEPARTMENT, WASHINGTON, *May* 29, 1878.

Secretary of War—

Requests that a mili-ry reservation, with boundaries as herein described, be duly declared and set apart by the Executive at Fort Brooke, Tampa, Florida, in lieu of the reservation made at the post by executive order dated January 22nd, 1877.

Encloses part of reservation, together with report and notes of survey by Lieut. James C. Bush, 5th artillery.

1st endorsement.

EXECUTIVE MANSION, *May* 29, 1878.

The within request is approved, and the reservation is made and proclaimed accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

R. B. HAYES.

53 Plaintiff's counsel objects to the admission of the above document, marked "B," in evidence in behalf of defendant on the following grounds:

1. That defendant has not shown nor has he offered to show that he was in such a position or occupied such a relation to the land in question as would entitle him to attack a patent issued by the Government of the United States to Louis J. Brush.

2. That the document offered is not legal or proper evidence in this cause.

3. That on its face it does not show nor does it purport to show that the patent admitted in evidence or the deed from Louis J. Brush to George F. Drew is illegal, null and void, or voidable.

4. That the certificate to the document offered does not show that it contains a complete history of the Fort Brooke military reservation at the time it contained the land in controversy.

5. That there has not yet been anything offered in evidence to show that the land in controversy ever was a part of the Fort Brooke military reservation.

Objection sustained; to which said ruling of the court defendant, by his counsel, then and there excepts.

54 Counsel for defendant next offers in evidence a diagram, marked "C," which shows the *the* locations of sections (18) eighteen and nineteen (19), township twenty-nine (29) south, of range nineteen (19) east, and section twenty-four (24), township twenty-nine (29) south, of range eighteen (18) east, Florida, and shows the — consequent upon the restoration to the public domain of the portion of the Fort Brooke military reservation relinquished by the Secretary of War January 4th, 1883, and which shows the contiguity of the land in question to that portion of the Fort Brooke military reservation last relinquished by the Secretary of War to the Secretary of the Interior and contained in the certificate of the Hon. N. C. Macfarlane, Commissioner of the General Land Office, under date of March 16, 1883, or appears to be 1883, which diagram is as follows:

(Here follows diagram marked p. 54*a*.)

Plaintiff's counsel object to admission in evidence of the plat or diagram marked "C" on the following grounds:

1. That it is not relevant to the issues joined in this cause.

2. That it does not tend to prove anything material to the defendant's defense or to disprove anything offered on behalf of the plaintiff.

3. That it is not properly certified to.

4. That there is no seal to the certificate.

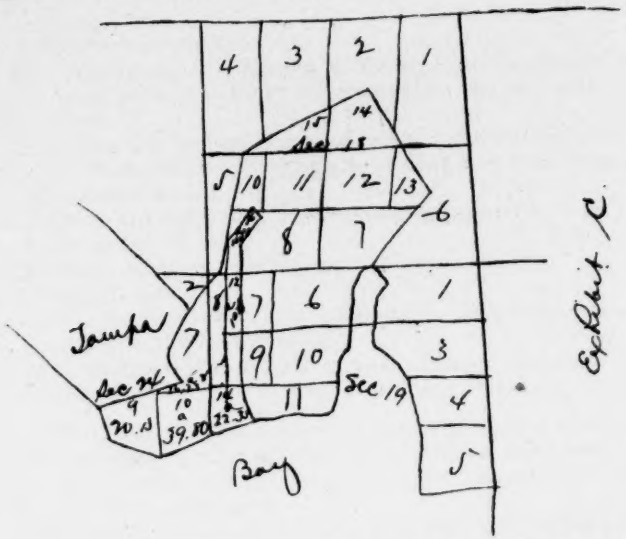
Objection sustained on the ground that the document is not admissable because it has no seal.

55 To which said ruling of the court defendant, by his counsel, did then and there except.

14573

No 234
Johnson } ep 54ac
Stewart

Diagram
of the
Relinquished Fort Brooke Military Reservation
Florida
T 29, S. R 18 and 19 E



Department of the Interior
General Land Office

March 16th 1885

I hereby certify that the above diagram of Sections 18 and 19 Township 29 South, Range 19 East and Section 24 Township 29 South Range 18 East Florida shows the portions consequent upon the restoration to the public domain of that portion of the Fort Brooke Military Reservation relinquished by the Secretary of War January 4th, 1883

N. C. Macfarlane
Commissioner

And the said defendant, by his attorney, further to prove the issue in his behalf, then and there produced as a witness one E. B. CHAMBERLAIN, who, having been duly sworn, deposes and says:

Direct examination.

By S. Y. FINLEY, Esqr.:

Q. What is your name?
A. Enoch B. Chamberlain.
Q. Do you know the defendant in this suit, James Johnson?
A. Yes, sir; I have known him.
Q. How long have you known him?
A. I have known him since the spring of '83, early in 1883—towards spring.
Q. Do you know where he resides now?
A. Yes, sir; I do.
Q. State where he resides.
A. He lives on what is known as lot eight, or familiarly called the Drew tract, former military reservation, on the east side of New Braska avenue.
Q. How long has he been residing where he now resides?
A. Well, he has lived on about that spot ever since I got
56 acquainted with him.
Q. When did you get acquainted with him?
A. In the spring of 1883.
Q. Has he lived there ever since?
A. I think he has.
Q. Is he in possession of that property? Was he in possession of the property in the spring of '83?
A. He lived about where he does now—in that same place.
Q. Was he exercising occupancy and possession of it?

Plaintiff's counsel objects to the propounding of the above question because it is asking for the opinion of the witness as to what possession is and involves a legal question; also because it is leading. Let the witness state the facts.

Objection sustained on the ground that the question is leading.

To which said ruling of the court defendant, by his counsel, did then and there except.

Q. Now, state all you know about the occupancy by the defendant of the land embraced in this suit; state all you know about it from the time you first knew defendant up to the present time; how he manifested any control or ownership over it—what he did—whether he put any improvements on it.
57 A. Mr. Johnson resided on the place where he is now living when I first got acquainted with him; he built a house on it.
Q. State all you know about the character of the occupancy of the land in question by the defendant. State what he did, and whether he made any improvements on the land, and whether he manifested and claimed ownership of it.
A. Mr. Johnson, about the first of July, 1883, and a little before

that time, made an effort to secure an application for the land. It was then understood that it had been transferred from the War Department to the Interior and he tried to make an effort to the local land office. I am well acquainted with the facts myself. I had a conversation with him at the time. I suppose he didn't know anything about a patent, and he tried to obtain title to the land; he was then residing on it, had a cabin, and had planted some trees on it; had some fruit trees growing on it and claimed it as a home. He had a house he lived in then, and he has built another one since, right alongside of it. He, with a number of other persons, tried to make an effort to secure a title to the land through the local land office because he supposed it was transferred to the Interior. He didn't distinguish between that and the balance, that is called 148 acres, and he was residing on it for that very purpose, waiting for it to get into the local land office.

(By PLAINTIFF'S COUNSEL:)

Q. Hold on. Do you know of this intention of your own knowledge?

58 A. I got it from the defendant himself.

Plaintiff's counsel request that the portion of the answer of the witness which refers to the intention of the defendant in residing on the land be stricken out, because the witness has not stated it of his own knowledge.

By the COURT: Mr. Chamberlain, you can only state what you know personally of your own knowledge. Mr. Finley, how is that testimony relevant in this case?

By Mr. FINLEY: "We desire to introduce this testimony, if your honor please, for the purpose of attacking the claim of the patent made by the plaintiff, and we propose to show by competent testimony the right of this defendant to the land in question under the act of Congress of July 5th, 1884. We contend that by virtue of an act of Congress of July 5th, 1884, we have an inchoate right to this land as against the plaintiff in this suit, who, as we claim, holds this land by a patent obtained through violated law. We claim it under that act of Congress of July 5th, 1884, and we will endeavor to show that we have complied with that act of Congress, and also to show that the occupancy, as in conflict with the claim of the patent, was

59 prior to this claim of the patent, and that the defendant was in occupancy of the land prior to the location and issuance of the patent."

By the COURT: "You are in the wrong court to set up that defense. The objection is sustained, and the portion of the answer of the witness referring to the intention of the defendant is ruled out."

To which said ruling of the court defendant, by his counsel, did then and there except.

Q. Do you know of this intention on the part of the defendant in this case to perfect title to the land of your own knowledge?

A. I know by his coming to me and asking what course he should pursue. He and about sixteen or seventeen others came to me in

regard to their lands, and he and some others, about five or six of them, came and went before Judge Crane. I knew most all of them at the time and made affidavits and sent their affidavits to Washington that they were residing on Fort Brooke, on this very land, for the purpose of securing title.

Plaintiff's counsel remarks that the witness is traveling outside of his own knowledge.

WITNESS: I sat by the judge when they were making their affidavits.

Plaintiff's counsel objects to the evidence given by the wit-
60 ness on the ground that it is irrelevant, defendant's counsel having stated that it was introduced for the purpose of showing some right under an act of Congress in 1884 and subsequent to the execution of the deed to George F. Drew by Louis J. Bush.

Objection sustained on the ground of irrelevancy; to which said ruling of the court defendant, by his counsel, did then and there except.

Q. State all that you know of your own knowledge of the occupancy and possession by the defendant of the land in question; state the time that he commenced such occupancy or possession and how long he exercised such occupancy; when it commenced, whether it was continuous from such commencement up to the present time and whether the defendant is in such possession now; the character of that occupancy and all the acts and manifestations and claim of ownership, if there were any exercised by the defendant and known to the witness, and this evidence is sought under the plea of the general issue and for the purpose of this defense.

Plaintiff's counsel object to the propounding of this interrogatory on the ground that the testimony of this witness heretofore given has shown that he knew nothing of this alleged occupancy until a date subsequent to the issuing of the patent, subsequent to the execution of the deed from Brush to Drew, and is therefore irrelevant; also on the ground that the question is leading and calls for
61 the opinion of the witness as to what is possession.

Objection is sustained to the extent of not permitting the witness to answer as to anything prior to the date of the patent.

Q. Didn't you say that you didn't know it until 1883?
A. No, sir. The spring of '83.

Defendant, by his counsel, excepts to the ruling of the court as given above.

By the COURT: "No testimony as to what is already pleaded is admissable. The pleadings in this case admit adverse possession."

Q. State, if you know of your own knowledge, whether the defendant was in occupancy and possession of the land in question on the first day of January, 1884, and whether he continued in such possession up to and including the 5th day of July, 1884.

Plaintiff's counsel object to the propounding of this question on

the ground that it is irrelevant, it being directed to a date subsequent to the issuing of the patent and the execution of the deed from Brush to Drew.

Objection sustained and excepted to by defendant's counsel.

Court adjourned until 8 a. m. the following morning.

62 SATURDAY, 28*th September, A. D.* 1889.

Morning session.

Court having met pursuant to adjournment and the jury having responded to their names, the trial of the cause was proceeded with.

E. B. CHAMBERLAIN recalled.

Direct examination by Mr. FINLEY:

Q. State, if you know of your own knowledge, whether the defendant was in occupancy and possession of the land in question prior to the first day of January, 1884, and whether he continued in that possession up to and including the 5th day of July, 1884.

Plaintiff's counsel object to the propounding of this question on the grounds:

1. That the testimony of this witness as heretofore given has shown that he knew nothing of this alleged occupancy until a date subsequent to the execution of the deed from Brush to Drew, and is therefore irrelevant.

2. That the question is leading and calls for the opinion of the witness as to what is possession.

Objection sustained on the ground that any proof of possession on the part of defendant since the date of the papers introduced is not competent or relevant because admitted by the plaintiff.

63 To which said ruling of the court defendant, by his counsel, did then and there except.

JAMES JOHNSON, the defendant in this cause, having been duly sworn, testified as follows:

Direct examination by Mr. FINLEY:

Q. What is your name?

A. James Johnson.

Q. Are you the defendant in this suit?

A. Yes, sir.

Q. State whether or not you are in possession of the land involved in this suit. Are you living on this land?

A. Yes, sir.

Q. When did you first take possession of and occupy this land?

Plaintiff's counsel object to the propounding of this question on the following grounds:

1. That it calls for the opinion of the witness as to what is possession.

2. That counsel for the defendant stated last night that his object in introducing evidence of this kind was to attack the patent issued

by the Government and to show rights in this defendant which he claims under an act of Congress passed in 1884.

3. That the question calls for an answer that is not pertinent to this issue in view of the pleadings and the facts already proven.

By the COURT: The question is not in proper shape. The
64 objection to the question in its present form is sustained. You can ask the witness as to any fact or act that would constitute possession in law, but you cannot ask him a leading question or a question calling for a legal opinion.

To which said ruling of the court defendant, by his counsel, did then and there except.

Q. Have you got a house on that land?

A. Yes, sir.

Q. State whether you built a house and made any improvements—what improvements you made and when you made them.

A. The first house I built there was in July, 1871. Then the next house I built there was about two years ago. The first epidemic I built another house there.

Q. State whether or not you have been living on that land ever since you built the first house in July, 1871.

A. Yes, sir.

Q. Have you been living there with your family?

A. My family has been living right there.

Q. State whether or not you cultivated it.

A. I planted it; planted a few trees and a few potatoes.

Q. Since that time have you occupied it as your home?

A. Yes.

Plaintiff's counsel to witness: "Hold on."

Plaintiff's counsel object to the propounding of this question and to the answer given by the witness on the following grounds:

65 1. That it calls for the opinion of the witness as to what is possession.

2. That counsel for defendant stated last night that his object in introducing evidence of this kind was to attack the patent issued by the Government and to show rights in this defendant which he claims under an act of Congress passed in 1884.

3. That the answer sought is not pertinent to this issue in view of the pleadings and the facts already proven.

Objections sustained and excepted to by defendant's counsel.

Q. State whether or not at that time and since and now you were and are at the head of a family.

A. Yes, sir; I was at the head of a family at that time.

Q. What does that family consist of?

Plaintiff's counsel objects to the propounding of the above question on the ground that it is not relevant in this case.

Objection is sustained; to which said ruling of the court defendant, by his counsel, did then and there except.

Q. State whether or not you settled upon this land in good faith

with the intention of making it your home, and entering it under the general land laws of the United States.

Plaintiff's counsel object to the propounding of the above
66 question for the following reasons:

1. That it is irrelevant.

2. That the question calls for the intention of the party and the *bona fides* of the party in building a house upon the land and in living upon it.

3. That the testimony heretofore given nor the pleadings have not shown such a state of facts as would entitle the defendant to prove facts now sought to be proven by him or to attack the patent admitted in evidence on behalf of plaintiff.

4. That defendant has not shown nor offered to show that he is in possession of the land or was in possession of it under any specific claim of title.

DEFENDANT'S COUNSEL: "We contend, if your honor please, that as a settler is protected by the laws that by virtue of the act of Congress of July 5, 1884, we have inchoate right to this land, not as against the Government, but as against individuals, and especially as against this plaintiff, who, as we claim, holds this land by a patent obtained through violated law."

By the COURT: "I understand that the patent is dated in 1882, and the act of Congress upon which you rely is dated 1884. You have no equitable plea admitted in this case."

67 DEFENDANT'S COUNSEL: "No; your honor struck it out."

By the COURT: "I struck the plea out because it was insufficient. The law provides for what is a good, equitable plea, and I was following the law in striking it out."

DEFENDANT'S COUNSEL: "The object of this investigation is to put ourselves under the protection of the act of Congress of July 5th, 1884, and we ask the ruling of the court on the question and the objection."

By the COURT: "And the court sustains the objection on the ground that the act of Congress of '84 could not divest rights that had vested in '82."

To which said ruling of the court defendant, by his counsel, did then and there except.

Q. State whether or not at the time that you made settlement upon the land in question you were twenty-one years of age and upwards and a citizen of the United States.

A. Yes, sir.

Q. A native-born citizen of the United States?

A. I was, sir.

68 DANIEL WALKER, having been duly sworn, testified as follows:

Q. What is your name?

A. Dan. Walker.

Q. State whether you know the defendant, James Johnson.

A. Yes, sir; I know him.

Q. How long have you known him?
A. I know him since '67.
Q. State if you know of your own knowledge whether the defendant made settlement on the land in question; and, if so, when he first made such settlement. State also, if you know, whether he made any improvements of said land. State all you know about his occupancy and improvement thereof.

Plaintiff's counsel object to the propounding of this question on the following grounds:
1. That some parts of the question call for the opinion of the witness upon a question of law—for instance, as to what is a settlement upon the land.
2. That it — irrelevant in view of the statement made by the defendant's counsel as to his purpose in introducing the testimony he seeks to elicit.
3. That the question assumes a fact which this witness has not testified to, viz., that a settlement had been made on the land.
4. That the defendant has not shown nor offered to show that he was on the land under any specific claim of title.

69 Objection sustained on the ground that if any part of the question is objectionable and not separated the objection to the whole must be sustained.

To which said ruling of the court defendant, by his counsel, did then and there except.

Q. State, if you know, whether or not defendant went into possession of this property with his family and took possession thereof as far back as 1871 or 1872.

Plaintiff's counsel object to the propounding of the above question for the following reasons:
1. That the question calls for the opinion of the witness as to what is possession.
2. That it is irrelevant in view of the statement made by defendant's counsel as to his purpose in introducing the testimony he seeks to introduce.
3. That the question assumes a fact to which the witness has not testified, viz., that a settlement had been made on the land.
4. That the defendant has not shown nor offered to show that he was on the land under any specific claim of title.
5. That the question is leading.

Objection sustained and excepted to by defendant's counsel.

70 Q. State if you know the defendant ever settled upon and occupied and improved the land in question; and, if so, when he first made such settlement.

Plaintiff's counsel object to the propounding of this question for the following reasons:
1. That the question calls for the opinion of the witness upon a question of law; for instance, as to what is a settlement upon the land.
2. That it is irrelevant in view of the statement made by defend-

ant's counsel as to his purpose in introducing the testimony he seeks to introduce.

3. That the question assumes a fact which the witness has not testified to, viz., that a settlement had been made on the land.

4. That the defendant has not shown nor offered to show that he was on the land under any specific claim of title.

5. That the question is leading.

Objection is sustained and excepted to by defendant's counsel.

Q. State whether or not if you know if the defendant made settlement upon and occupied the land in question prior to the first day of January, 1884, and remained continuously in such possession and occupancy up to and including the fifth day of July, 1884.

Plaintiff's counsel object to the propounding of the above
71 question for the following reasons:

1. That the question calls for the opinion of the witness upon a question of law; for instance, as to what is a settlement upon the land.

2. That it is irrelevant in view of the statement made by defendant's counsel as to his purpose in introducing the testimony he seeks to introduce.

3. That the question assumes a fact to which the witness has not testified, viz., that a settlement had been made upon the land.

4. That the defendant has not shown nor offered to show that he was on the land under any specific claim of title.

5. That the question is leading.

6. That it does not mention a particular date prior to 1884.

Objections sustained; to which said ruling of the court defendant, by his counsel, did then and there except.

JOHN PATTON, having been duly sworn, testifies as follows:

Direct examination by Mr. FINLEY:

Q. Do you know defendant, James Johnson?

A. I do.

Q. How long have you known him?

A. Fifteen years.

Q. State whether or not you know where the defendant now lives.

A. I do.

Q. You have been to his house?

72 A. I have been there often.

Q. State, if you know, how long he has been continuously living at the same place where he now lives.

A. For the length of time that I know him—fifteen years.

Q. State whether or not he made any improvements on the place; and, if so, what.

A. During the year 1887 I built a house there for him.

Q. Did he move into and occupy that house?

A. He did.

Q. Has he been living in it ever since?

A. To my knowledge he has been.
Q. To your certain knowledge?
A. Yes, sir.

Defendant calls for Record Book "U" of the records of deeds of Hillsborough county, Florida; which said book having been brought by the deputy clerk and delivered to said counsel, defendant's counsel proceeds to offer in evidence the record of what purports to be a deed from George F. Drew and Amelia Drew, as grantors, to Walter B. Clarkson, dated the 13th day of December, A. D. 1885, and recorded in the record of deeds of Hillsborough county, Florida, in Book "U," pages 1 and 2, in words and figures as follows:

73

G. F. Drew
to
W. B. Clarkson.

This indenture made the 13th day of December, in the year of our Lord one thousand eight hundred and eighty-five, between George F. Drew and Amelia Drew, his wife, of the county of Duval and State of Florida, of the first part and Walter B. Clarkson of said county and State, of the second part,

Witnesseth, that the said parties of the first part for and in consideration of the sum of four thousand and five hundred dollars $4,500.00 lawful money of the United States of America, to them in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, aliene, remise, release, convey and confirm unto the said party of the second and his assigns forever, all those certain lots, pieces or parcels of lands situate and lying and being in the county of Hillsborough and State of Florida described as follows: All of blocks numbered eight (8) nine (9) ten (10) eleven (11) sixteen (16) seventeen (17) nineteen (19) twenty-three (23) twenty-four (24) and twenty-six (26) and lot numbered one (1) in block numbered twenty-two (22) all in Drew's addition to the town of Tampa, according to the plat of said addition on file in the clerk's office in the court-house in the town of Tampa, county of

74 Hillsborough, State of Florida, being comprised in lot numbered eight (8) of section nineteen (19) in township twenty-nine (29) south of range nineteen (19) east and lot numbered seven (7) of section twenty-four in township twenty-nine (29) south of range eighteen (18) east of Tallahassee meridian and patented by the United States to Louis J. Brush September 30th, A. D. 1882. and deeded by the said Louis J. Brush and Margaret A. Brush, his wife to George F. Drew on 23rd day of April A. D. 1883, together with all and singular the tenements, hereditaments and the appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, dower and right of dower, separate estate, property, possession, claim and

demand whatsoever, as well in law as in equity, of the said parties of the first part of in and to the same and every part and parcel thereof with the appurtenances,

To have and to hold the above granted, bargained and described premises with appurtenances unto the said party of the second part, his heirs and assigns, to his own proper use, benefit and behoof forever. And the said parties of the first part for themselves and their heirs, executors and administrators, covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that the said parties of the first part at the time of the sealing and delivery of these presents are lawfully seized in fee-simple of a good, absolute and indefeasible estate of inheritance of and in all and singular the above granted, bargained and described premises
75 with the appurtenances and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid. And that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably, quietly have, hold, use, occupy, possess, and enjoy the above-granted premises and every part and parcel thereof with the appurtenances, without any let, suit or trouble, molestation, eviction or disturbance of the said parties of the first part, their heirs or assigns, or other person or persons lawfully claiming or to claim the same, and that the same are now free, clear, discharged and unencumbered of and from all former grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature and kind soever. And the said parties of the first part for themselves, their heirs the above-described and hereby granted and released premises and every part and parcel thereof with the appurtenances unto the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs and against all and every person or persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) GEORGE F. DREW. [SEAL.]
(Signed) AMELIA DREW. [SEAL.]

Signed, sealed, and delivered in presence of us—
(Signed) LOUIS J. BRUSH.
(Signed) E. R. VAN BUREN.

76 STATE OF FLORIDA, }
County of Duval. }

Know all men by these presents that I, Emilia Drew, wife of the above-named George F. Drew, do by these presents, made and executed by me separate and apart from my said husband and in the presence of George L. Drew, a notary public of the State of Florida, acknowledge and declare that I did make myself a party to and executed the foregoing deed of conveyance for the purposes of relinquishing my dower and right of dower in and to the lands in said convey-

ance therein described and granted, and that I did the same freely and voluntarily and without any compulsion, constraint, apprehension, or fear of or from my said husband.

In witness whereof I hereunto subscribe my name and affix my seal this thirtieth (30th) day of December, one thousand eight hundred and eighty-five.

(Signed) EMILIA DREW. [SEAL.]

STATE OF FLORIDA, }
County of Duval. }

To all whom it may concern:

Be it known that on the thirtieth day of December, A. D. 1885, personally appeared before me, a notary public of the State of Florida, the above-named Emilia Drew, to me well known
77 as the wife of George F. Drew and as one of the persons described in and who executed the foregoing deed of conveyance, and who being at the time separate and apart from her said husband the said Emilia Drew did then and there make and execute the foregoing acknowledgment, her name being with her own hand subscribed and her seal affixed in my presence.

Witness my hand and seal, at Jacksonville, the day and year above written.

(Signed) GEORGE L. DREW. [SEAL.]

STATE OF FLORIDA, }
County of Duval. }

On this day personally appeared before me George F. Drew and Emilia Drew, to me well known as the persons described in and who executed the foregoing deed of conveyance, and acknowledged that they executed the same for the purposes therein expressed; whereupon it is prayed that the same may be recorded.

In witness whereof I have hereunto affixed my hand and seal this thirtieth day of December, A. D. 1885.

(Signed) GEORGE L. DREW. [SEAL.]

78 Filed Jan'y 2nd, 1886. Recorded Feb. 4, 1886.
W. A. GIVENS, *Clerk*,
By D. B. GIVENS, *D. C.*

Plaintiff's counsel object to the admission of said record in evidence on the following grounds:

1. That it is seeking to introduce the record itself of a deed in evidence, which is not permissible under the laws of this State.
2. That counsel for defendant does not account for the original deed nor undertake to account for it.
3. That the record offered is not a certified copy of the deed so as to permit the introduction of a copy in lieu of the original deed.
4. That the evidence offered is irrelevant to the issue in this cause.

By the COURT: The opinion of this court is that it is very reprehensible for the clerk to allow that book to go out of his office.

Defendant's counsel stated that said book had been delivered upon the requisition of counsel as a record of the court.

79 By the COURT: Is that a record of this court?

DEFENDANT'S COUNSEL: Yes, sir; it is in the clerk's office of the court.

By the COURT: No, sir; it is in the clerk's office of the county court and is not a circuit court record at all. We will reverse that practice and you can take the benefit of your exceptions.

Objection of plaintiff's counsel sustained and excepted to by defendant's counsel.

Defendant rests.

80 And the said judge, the said parties having concluded and submitted their testimony and the several matters aforesaid, did then and there, at the request of the plaintiff's counsel, give his opinion and deliver his charge to the jury as follows:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

Plaintiff's counsel ask the court to instruct the jury as follows:

1. That a patent from the Government of the United States is the highest evidence of title and is conclusive as against the Government and all persons claiming under titles acquired since the issuing of the patent until set aside or annulled or unless it is absolutely null and void.

2. That in a suit of ejectment the holder of such a patent must prevail against all other persons not having a legal title older than such patent.

3. And you are instructed that bare possession by a person of a tract of land at the time of the issuing of the patent to another person does not create any right in the person in possession as against the patent held by such other person.

81 4. That if the jury believe from the evidence in this case that the plaintiff holds a patent from the Government of the United States for the land in controversy or is the grantee of a party who so held a patent for the land from the Government of the United States, that they must find for the plaintiff unless defendant has produced in evidence a prior patent or a legal title of a date prior to the issuing of the patent to the plaintiff or his grantee.

5. That the bare possession of the defendant, although he may have been on the land prior to the issuing of the patent, does not entitle him to come into a court of law and defend as against such patent, nor does he by said possession acquire such right as would entitle him to question the legality of such patent.

Given under the pleadings and evidence in this case Sept. 28th, 1889; to all of which defendant excepts.

Signed, sealed, and made a part of the record.

G. A. HANSON,
Judge 6th Circuit.

To which said opinion and charge of the court the said defendant, by his attorney, did then and there except.

And the said defendant did then and there, by his attorney, duly present to the said judge his charge in writing and asked the said judge to give the same in charge to the jury in behalf of the
82 defendant in words and figures as follows:

In the Circuit Court, Sixth Judicial Circuit, of Florida, Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

The defendant's counsel asks the court to charge the jury as follows:

1. That in an action of ejectment plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of the defendant's.

2. In this action, before the plaintiff can recover, it must be shown by the evidence not only that the title to the land in question at the commencement of the suit was in plaintiff, but that the plaintiff, both at that time and now at the time of the trial, has the right of possession of the land in question and the title thereto.

Refused.

3. If you find by the evidence that the plaintiff had parted with the title to the land in question or any part thereof, then the plaintiff would not be entitled in this action to recover for any portion of the land so conveyed by plaintiff to any one else before the commencement of the suit or since that time.

Refused.

4. If you find from the evidence that the plaintiff *deserves* title from Louis J. Brush, and that Louis J. Brush procured a patent from the United States for the land in question by the loca-
83 tion of Valentine scrip thereon and the purchase thereof with Valentine scrip, and if you further find from the evidence that at the time of such location and purchase of said land by said Brush that said land was in the actual possession of the defendant, and that the defendant was then occupying the same as his home openly and notoriously, claiming and cultivating and improving the same and exercising ownership thereof, then, in such case, the court charges you that such location and purchase of said land with Valentine scrip would be illegal, and, as against the defendant in possession, would not rest in said Brush or in the plaintiff, claiming

under him, either the title or right of possession in and to the land in question, and you should find for the defendant.

Refused.

5. If you find from the evidence that the plaintiff claims title through a patent issued to Louis J. Brush, and if you further find that said patent was obtained with Valentine scrip, located upon said land with said scrip by said Brush, and if you further find from the evidence that at the time of such location of said land with Valentine scrip said land was not unappropriated public land of the United States, then such patent would be illegally issued and would convey no title or right of possession to said Brush or to the plaintiff, claiming under him.

Refused.

6. If you find from the evidence that the patent upon which the plaintiff relies was illegally issued by the officers of the land department in violation of the act of Congress in such case made
84 and provided, and that the defendant was in the actual occupation of said land and settled thereon prior to January 1st, 1884, in good faith for the purpose of securing a home and entering the same under the general land laws of the United States and has continued in such occupation up to and including the fifth day of July, 1884, and up to the present time and is by law entitled to make a homestead entry, and that said land is a part of the Fort Brooke military reservation, at Tampa, Florida, that said land was subject to entry under the public land laws at the time of their withdrawal, that you should find for the defendant.

Refused.

The first charge given; the 2d, 3d, 4th, 5th, and 6th refused as not applicable to the evidence in this case and because calculated to confuse or mislead the jury.

To which ruling defendant excepts.

Signed, sealed, and made a part of the record.

G. A. HANSON,
Judge 6th Circuit.

Sept. 28th, 1889.

To which said opinion of the said judge, refusing to give in charge to the jury the said 2d, 3d, 4th, 5th, and 6th charges, as asked for by the defendant's counsel, the said defendant, by his attorney, did then and there except.

85 And the said judge did then and there, of his own motion, deliver the following further charge to the jury in words and figures as follows:

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

GENTLEMEN OF THE JURY: This is an action of ejectment, by which the plaintiff seeks to recover possession of a certain tract of land as described in the pleadings which he claims is wrongfully withheld from him.

The defendant pleads not guilty, thereby forming the issues you are to try. In order to recover, the plaintiff must show that he, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within seven years next before the commencement of this action, and must recover, if at all, on the strength of his own title.

But in every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises had been
86 held and possessed adversely to such legal title for seven years before the commencement of the suit or action for recovery.

An adverse possession is defined to be either where a party enters into possession of the premises under a claim of title exclusive of all other rights, founding such claim upon a written instrument as a conveyance, and actually continues in possession of the premises in question when such possession is based upon the decree or judgment of a competent court; if not founded upon a color of title by a written instrument or the decree or judgment of a competent court, the premises shall be deemed to have been possessed and occupied only in the following cases:

1. Where it has been protected by a substantial enclosure, or

2. Where it has been usually cultivated or improved and in case the possession shall be continuous.

You have heard the evidence and you are the judges of its weight, and also the judges as to the credibility of the witnesses, and it is your duty to consider all the facts and make up your verdict accordingly.

If you find for the plaintiff, it is your duty to find the quantity of his estate and the description of the land, and the form of your verdict should be, We, the jury, find for plaintiff, and state the quantity of estate and describe the land by its numbers or as described in the declaration; so say we all; and let one of your number sign as foreman.

If you find for the defendant, the form of your verdict
87 should be, We, the jury, find for the defendant; so say we all; and let one of you, as foreman, sign it.

And the said judge, under the charge and with the directions aforesaid, submitted the said issue and the evidence so given on the said trial to the jury, and the jury aforesaid then and there gave their verdict for the said plaintiff in words and figures as follows:

GEORGE F. DREW
vs. } Ejectment.
JAMES JOHNSON.

We, the jury, find that the plaintiff has a fee-simple estate in the following-described land, situate, lying, and being in the county of Hillsborough and State of Florida, to wit:

The lot numbered eight (8) of section nineteen (19), in township twenty-nine (29) south, of range nineteen (19) east, and the lot numbered seven (7) of section twenty-four (24), in township twenty-nine east, of range eighteen east, containing forty and nineteen one-hundredths of an acre, and that the said plaintiff, George F. Drew is entitled to the possession of the above-described land.

So say we all.

C. F. WILDER, *Foreman.*

88 And the said defendant, by his attorney, then and there at the term of the court aforesaid did enter in writing and submit to the said court his motions that the said verdict be set aside, and that a new trial be granted, in words and figures as follows:

In the Circuit Court, Sixth Judicial Circuit, of Florida, Hillsborough County, Fall Term, 1889.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

Plaintiff's counsel will please take notice that defendant, by his counsel, will move the court as soon as we can be heard for a new trial in the above-entitled cause upon the following grounds:

1. Because the verdict of the jury is contrary to the evidence and to the charge of the court in said cause.

2. Because the court erred in refusing to give to the jury the charges asked by the defendant's counsel numbered 2d, 3d, 4th, 5th, and 6th charges for the defendant.

3. Because the court erred in giving the charges asked by the plaintiff's counsel numbered 1st, 2d, 3d, 4th, and 5th.

4. Because the court erred in admiiting in evidence the patent to Louis J. Brush, it appearing upon the face of said patent that
89 it was obtained with and predicated upon Valentine scrip, and that said land is a part of the Fort Brooke military reservation, at Tampa, Florida.

5. Because the court erred in refusing to allow the defendant to prove that at the time of the location of the land in question and the issuance of the patent to Louis J. Brush said land was not unoccupied public land of the United States, but was then in the open and undisputed occupancy by the defendant of the same, occupying the same as his home, and that he has continued in such occupation of the same continuously from that time until the trial of the suit.

6. Because the court erred in refusing to allow the defendant to prove that he was in the actual occupation of said land prior to the 1st day of January, A. D. 1884, and had before said date settled upon said land in good faith with intent to secure the same under the public land laws of the United States and had continued in such occupation up to and including the 5th day of July, A. D. 1884, the time of the passage of the act of Congress of July 5th, A. D. 1884, and had continued in such occupation up to the trial of this suit.

7. Because the court erred in refusing to allow the defendant to prove that the plaintiff had parted with title to said land prior to the commencement of this suit, and that at the time of the trial of this suit all the title which the plaintiff claimed under the patent to Louis J. Brush had been conveyed by the plaintiff to one Walter B. Clarkson, and that at the time of the said trial there was no title or right of possession in said land in the plaintiff.

90

S. Y. FINLEY AND
LUCIUS FINLEY,
Att'ys for Def't.

Motion overruled. Sept. 28th, 1889.

G. A. HANSON,
Judge 6th Circuit Court.

Defendant excepts.

And the said motion coming on to be heard on the 28th day of September, A. D. 1889, at the term aforesaid, the said court did consider and decide that the said motion should not be granted; to which decision the said defendant, by his attorneys, did then and there except.

91 Whereupon the court aforesaid, on the 28th day of September, A. D. 1889, at the term aforesaid, did render judgment in favor of the said plaintiff and against the said defendant in words and figures as follows, to wit:

It is therefore ordered and adjudged by the court that, in accordance with the said verdict, the said George F. Drew, plaintiff, do have and recover of and from the said defendant, James Johnson, in fee-simple possession of the following-described lands, situate, lying, and being in the county of Hillsborough and State of Florida, to wit: The lot numbered eight (8) of section nineteen (19), in township twenty-nine (29) south, of range nineteen (19) east, and the lot numbered seven (7) of section twenty-four (24), in township twenty-nine (29) south, of range eighteen (18) east, containing forty and nineteen one-hundredths acres.

It is further ordered and adjudged that the said plaintiff, George F. Drew, do have and recover of and from the said defendant, James Johnson, the sum of —— dollars and —— cents for his costs in this behalf laid out and expended; which said judgment appears of record; and inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the verdict and judgment aforesaid, the said defendant, by his counsel aforesaid, did on the — day of November, A. D. 1889, after the expiration of the term of court aforesaid, by virtue of a special order herein made, propose *that* his bill of ex-

92 ceptions to the said opinions and decisions of the said judge and requests him to sign the same, according to the form of the statute in such case made and provided, which is done this 19th day of November, A. D. 1889.

G. A. HANSON, [SEAL.]
Judge of the Circuit Court, Sixth Judicial Circuit of Florida.

And the said defendant, during the said term, in open court, applied for and entered his appeal from the said judgment to the supreme court of the State of Florida; which said entry of appeal is as follows:

In Circuit Court, Sixth Judicial Circuit, of Florida in and for Hillsborough County.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

And now, at the term of court aforesaid, comes the defendant, by Lucius Finley and S. Y. Finley, his attorneys, and in open court applies for and enters his appeal from the judgment herein rendered to the supreme court of the State of Florida to be held at
93 the city of Tallahassee, Florida, on the second Tuesday in January, 1890.

LUCIUS FINLEY AND
S. Y. FINLEY,
Attorneys for Defendant.

And afterwards, on the 18th day of October, 1889, the defendant filed his bond, which, with the approval thereof, is in the words and figures following, to wit:

In the Circuit Court, Sixth Judicial Circuit, of Florida, Hillsborough County, Fall Term, A. D. 1889.

GEORGE F. DREW
vs.
JAMES JOHNSON. } Ejectment.

STATE OF FLORIDA,
Hillsborough County.

Know all men by these presents that we, James Johnson and D. Ghira and Lamont Bailey, acknowledge ourselves indebted to George F. Drew in the sum of two hundred dollars; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and firmly, by
94 these presents.

In testimony whereof witness our hands and seals this the 18th day of October, A. D. 1889.

The condition of this obligation is such that whereas the said George F. Drew, at the fall term of the circuit court, sixth judicial circuit, of Florida in and for Hillsborough county, A. D. 1889, recovered a judgment against the above-bounden James Johnson, the defendant in an action of ejectment for the possession of certain land therein mentioned, and the said above-bounden James Johnson, the defendant in said action of ejectment, being dissatisfied with said judgment and having prayed for and entered his appeal in

open court before the adjournment of said circuit court to the next term of the supreme court of the State of Florida:

Now, if the above-bounden James Johnson shall well and truly pay all the costs and damages that have been accorded to the said plaintiff, George F. Drew, or that may hereafter be awarded in case the said judgment of the said circuit court shall be affirmed, then this obligation to be void; else to remain in full force and virtue.

his
JAMES x JOHNSON. [SEAL.]
mark.
CATHEO A. JACKSON. [SEAL.]
D. GHIRA. [SEAL.]
LAMONT BAILEY. [SEAL.]

In presence of—
O. H. JACKSON.
T. A. BIVENS.

95 STATE OF FLORIDA, }
Hillsborough Co. }

Personally appeared D. Ghira and Lamont Bailey, sureties in the above obligation, who, being duly sworn, say that they are worth the sum of two hundred dollars, the amount of said bond, over and above all constitutional exemptions.

(Signed) D. GHIRA.
(Signed) LAMONT BAILEY.

Sworn to and subscribed before me this the 18th day of October, 1889.

[SEAL.] F. A. BOWERS,
Notary Public for the State of Florida at Large

The within bond is hereby approved this 18th day of October.

W. A. GIVENS, [SEAL.]
Clerk Ct. Ct. Hillsborough County, Fla.,
By D. B. GIVENS, *D. C.*

Endorsed on back: In the circuit court, 6th judicial circuit, of Fla., Hillsborough county. George F. Drew *vs.* James Johnson. Filed Oct. 18, 1889. W. A. Givens, clerk, by D. B. Givens, D. C.

96 The United States of America to all to whom these presents shall come, Greeting:

R. & R. No. 7.

Whereas, in pursuance of the act of Congress approved April 5, 1872, entitled "An act for the relief of Thomas B. Valentine," there has been deposited in the General Land Office special certificate of location, E No. 265, for forty acres, in favor of Thomas B. Valentine, with evidence that the same has been duly located upon the lot numbered eight (8) of section nineteen, in township twenty-nine south, of range nineteen east, and the lot numbered seven of section twenty-four, in township twenty-nine south, of range eighteen east

of Tallahassee meridian, in the district of lands subject to sale at Gainesville, Florida, containing forty acres and nineteen-hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, the said special certificate of location having been assigned by the said Thomas B. Valentine to Louis J. Brush, in whose favor said tract has been located:

Now, know ye that there is therefore granted by the United States unto the said Louis J. Brush, as assignee as aforesaid, and to his heirs the tract of land above described:

To have and to hold the said tract of land, with the appurtenances thereof, unto the said Louis J. Brush, as assignee as aforesaid, and to his heirs and assigns forever.

This patent is issued in lieu of an erroneous one dated
97 August 10th, 1882, which has been cancelled.

In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patents and the seal of the General Land Office to be hereunto affixed.

Given under my hand and seal, at the city of Washington, the thirtieth day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

By the President:

(Signed) CHESTER A. ARTHUR,
By O. L. JUDD,
Ass't Secretary.

Recorded, vol. 1, page 69.

[Seal of General Land Office.]

(Signed) S. W. CLARK,
Recorder of the General Land Office.

98 To the foregoing is attached the following:

STATE OF FLORIDA, }
County of Hillsborough. }

Be it remembered that on the 7th day of May, A. D. 1883, the annexed instrument of writing was presented and filed for record with the subscriber, clerk of the circuit court for said county, and, the same being properly authenticated, I have duly recorded the same in Book "G," on pages 781 and 782.

[Seal Circuit Court.]

(Signed) WM. C. BROWN, *Clerk*,
By H. L. CRANE, *D. C.*

On back of the foregoing instrument is written: United States to Louis J. Brush. Recorded. Filed this seventh day of May, A. D. 1883. (S'g'd) Wm. C. Brown, clerk circuit court, by H. L. Crane, D. C. Recorded in Book G, pages 781 and 782, Hillsborough Co., Fla.

99 This indenture, made the 23rd day of April in the year of our Lord one thousand eight hundred and eighty-three, between Louis J. Brush, and his wife, Margaret A. Brush, of the county of Madison and State of Florida, of the first part, and George F. Drew of the same county and State, of the second part,

Witnesseth, that the said parties of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release and convey and confirm unto the said party of the second part, and his heirs and assigns forever, all the tract of land lying and being in the county of Hillsborough and State of Florida, described as follows:

On a patent from the United States Government, dated at Washington, D. C. Sept. 13th, A. D. 1882, to wit: The lot numbered eight of section nineteen in township twenty-nine south of range nineteen east, and the lot numbered seven of section twenty-four in township twenty-nine south of range eighteen east of Tallahassee meridian in the district of lands subject to sale at Gainesville, containing forty acres and nineteen-hundredths of an acre.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents

100 issues and profits thereof.

And also, all the estate, right, title, interest, dower and right of dower, separate estate, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in and to the same, and every part and parcel thereof with the appurtenances;

To have and to hold the above granted, bargained and described premises with the appurtenances, unto the said party of the second part, his heirs and assigns, to their own proper use and benefit and behoof forever.

And the said parties of the first part for themselves and for their heirs, executors and administrators, do covenant, promise and agree, to and with the said party of the second part, his heirs and assigns, that the said parties of the first part, at the time of the sealing and delivery of these presents, is lawfully seized in fee-simple of a good, absolute and indefeasible estate of inheritance of and in all and singular the above granted, bargained and described premises, with the appurtenances, and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the above-granted premises, and every part and parcel thereof with the appurtenances without any let, suit, trouble, molestation, eviction or dis-

101 turbance of the said parties of the first part, their heirs or assigns, or of any other person or persons lawfully claiming

or to claim the same, and that the same are now free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what nature and kind soever.

And the said parties of the first part, for themselves and their heirs, the above described, and hereby granted and released premises, and every part and parcel thereof with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said parties of the first part and *his* heirs and against all and every person or persons whomsoever lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) LOUIS J. BRUSH. [SEAL.]
(S'g'd) MARGARET A. BRUSH. [SEAL.]

Signed, sealed, and delivered in the presence of us—
(S'g'd) E. F. CLARK.
" F. E. RANKIN.

102 STATE OF FLORIDA, }
County of Madison. }

Know all men by these presents that I, Margaret A. Brush, wife of the above-named Louis J. Brush, do by these presents, made and executed by me separate and apart from my said husband and in the presence of Geo. Clark, a justice of the peace of the State of Florida, acknowledge and declare that I did make myself a party to and executed the foregoing deed of conveyance for the purpose of relinquishing all my right of dower in and to the lands in said conveyance therein described and granted, and that I did the same freely and voluntarily and without any compulsion, constraint, apprehension, or fear of or from my said husband.

In witness whereof I hereunto subscribe my name and affix my seal this — day of ——, A. D. one thousand eight hundred and ——.

(Signed) MARGARET A. BRUSH. [SEAL.]

STATE OF FLORIDA, }
County of Madison. }

To all whom it may concern:

Be it known that on this twenty-third day of April, A. D. 1883, personally appeared before me, a justice of the peace of the State of Florida, the above-named Margaret A. Brush, to me well known as the wife of Louis J. Brush and as one of the persons described
103 in and who executed the foregoing deed of conveyance, who, being at the time separate and apart from her husband, the said Louis J. Brush, did then and there make and execute the foregoing acknowledgment, her name being with her own hand subscribed and her seal affixed in my presence.

Witness my hand and seal, at Ellaville, Fla., the day and year above written.

(Signed) GEO. CLARK, *J. P.* [SEAL.]

STATE OF FLORIDA, }
County of Madison. }

On this day personally appeared before me Louis J. Brush, to me well known as the person described in and who executed the foregoing deed of conveyance, and acknowledged that he executed the same for the purpose therein expressed; whereupon it is prayed that the same may be recorded.

In witness whereof I have hereunto affixed my hand and seal this twenty-third day of April, A. D. 1893.

(Signed) GEO. CLARK, [SEAL.]
Justice of the Peace.

104 STATE OF FLORIDA, }
County of Hillsborough. }

Be it remembered that on this seventh day of May, A. D. 1883, I, Wm. C. Brown, clerk of the circuit court in and for said county, have duly filed and recorded the foregoing deed in the public records of said county, in Book "G," pages 796, '97, '98, and '99.

In witness whereof I have hereunto set my hand and the seal of said court this 21st day of May, A. D. 1883.

[Seal of Ct. Ct.]

(Signed) WM. C. BROWN, *Clerk*,
(S'g'd) By H. L. CRANE, *D. C.*

Upon the back of this instrument is endorsed: Warranty deed from Louis J. Brush and wife to Geo. F. Drew, dated April, 1883. Filed in the office of the clerk of the circuit court for the county of Hillsborough, State of Florida, on the seventh day of May, A. D. 1883, and recorded in Book "G," on pages 996, '97, '98, and '99. (Signed) Wm. C. Brown, clerk of circuit court, by (signed) H. L. Crane, D. C.

105 E. DEPARTMENT OF THE INTERIOR, J. E.
M. L. 32778. GENERAL LAND OFFICE, O. H.
WASHINGTON, D. C., *April* 15, 1885. Sig.

I, Wm. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copies of letters from the Secretary of War to the Secretary of the Interior, dated respectively July 24, 1860 (with enclosure), January 4, and March 8, 1883, and of copy of letter from the Secretary of War to the Secretary of the Interior dated April 6th, 1870, are true and literal exemplifications of the original letters and official copy on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal of General Land Office.]

(Signed) WM. A. J. SPARKS,
Commissioner of General Land Office.

106 WAR DEPARTMENT, *July 24th*, 1860.

SIR: Referring to the correspondence between the two departments on the subject, I have the honor to enclose to you a report of the quartermaster general showing that Fort Brooke is now in readiness to be turned over to the Department of the Interior in pursuance of the arrangement made to that effect.

Very respectfully, your obedient servant,

(Signed) JOHN B. FLOYD,
Secretary of War.

Hon. J. Thompson, Secretary of the Interior.

(Enclosure.)

Q. MASTER GENERAL'S OFFICE,
WASHINGTON CITY, *July* 13, 1860.

SIR: I have the honor to inform you that all the moveable property at Fort Brooke, Florida, belonging to the United States has been sold, in conformity to your instructions of the 29th of March last, and that no reason now exists, to my knowledge, why the military reservation at that place may not, agreeably to your
107 determination, be turned over to the Department of the Interior under a provision of an act of Congress "making appropriations for certain civil expenses of the Government for the year ending the 30th of June, 1857," approved August 18, 1856.

Very respectfully, your obed. serv't,

(Signed) J. G. JOHNSTON,
Quartermaster General.

Hon. J. B. Floyd, Sec'y of War, Washington, D. C.

(Copy.)

WAR DEPARTMENT, WASHINGTON CITY, *April* 6, 1870.

The honorable Secretary of the Interior.

SIR: I have the honor to reply to a letter addressed to this department by the Commissioner of the General Land Office on the 26th ultimo relative to the public lands occupied by this department for military purposes at Fort Brooke, Florida, and to inform you that there is no longer any objection to their disposition by the General Land Office under the laws governing the subject.
108 The necessary orders have been given for the disposition of the movable public property at the post.

Very respectfully, your ob't servant,

WM. W. BELKNAP,
Secretary of War.

3448*a* of 1882. WAR DEPARTMENT,
WASHINGTON CITY, *January 4th*, 1883.

SIR: Referring to previous correspondence, particularly to your letter of August 10th, enclosing a copy of the report of the Commis-

sioner of the General Land Office in reply to department letter of July 3d, 1882, respecting the transfer to the Department of the Interior of the present military reservation of Fort Brooke, Florida, which was originally transferred to that department July 24, 1860, and was subsequently reoccupied for military purposes, I have the honor to state that the public buildings and property at said reservation have been disposed of at public sale pursuant to an appraisement by a board of officers convened for that purpose under instructions from this department. Such action having removed the only obstacle to the transfer to your department of the custody of this reservation, as indicated in your letter and the report of the Commissioner of the General Land Office above mentioned, and
109 the reservation being no longer needed for military purposes, the same is hereby relinquished and transferred to the Department of the Interior in accordance with the act of Congress, August 18, 1856.

It should be added that removal will at once be made of the remains of certain officers and enlisted men interred on the reservation, and that an agent of the quartermaster's department will be left in charge of the reservation for one month from the present date, within which time it is hoped the Department of the Interior will be able to assume charge thereof.

Very respectfully, your obedient servant,

ROBERT T. LINCOLN,
Secretary of War.

The honorable the Secretary of the Interior.

110 1139*a*.

WAR DEPARTMENT,
WASHINGTON CITY, *March* 8, 1883.

SIR: Referring to previous correspondence respecting the military reservation of Fort Brooke, Tampa, Florida, particularly to the department letter of Jan'y 4th last, relinquishing and transferring to the Department of the Interior the reservation named, I have the honor to state that report has been made to the department by the military authorities that no agent of your department has as yet presented himself to assume charge of the reservation.

I therefore beg to invite your attention to the matter and to state that the services of the quartermaster's agent now in charge of the reservation will be continued until the 15th instant, at which date he will be discharged.

Very respectfully, your obedient servant,

ROBERT T. LINCOLN,
Secretary of War.

To the honorable the Secretary of the Interior.

The foregoing is endorsed on back as "Exhibit A."

111 (4–207.) Q. A.

E. DEPARTMENT OF THE INTERIOR, J. H. B.
M. L. 49668. GENERAL LAND OFFICE, J. A. P.
M'ch 19, '89. WASHINGTON, D. C., *March* 21, 1889. I. V. W.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed copies of executive orders dated January 22nd, 1877, and May 29th, 1878, setting apart certain lands at the post of Fort Brooke, Tampa, Florida, as a military reservation, are true and literal exemplifications of the originals of said executive orders on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal of General Land Office.]

(Signed) S. M. STOCKSLAGER,
Commissioner of General Land Office.

112 6865–76. WAR DEPARTMENT,
WASHINGTON CITY, *January* 22*nd*, 1877.

To the President.

SIR: I have the honor to request that a military reservation at the post of Fort Brooke, Tampa, Florida, as described in the enclosed report from the commanding general's department of the South and accompanying plat, may be duly declared and set apart by the Executive. The reservation recommended consists of three tracts, as follows:

I. Tract marked A. B. C. containing 127,417 acres.
II. Tract marked *n*, *m*, *l*, *k*, containing ten (10) acres.
III. Right of way between tracts I and II, marked B *n k* P.

Very respectfully, your obedient servant,
J. D. CAMERON,
Secretary of War.

On back of above is the following endorsement:

WASHINGTON, *January* 22*nd*, 1877.

Secretary of War requests that a mil. reservation at Fort Brooke, Tampa, Fla., as described in enclosed report from com'd'g gen. dep't South, and accompanying plat, may be duly set apart
113 by the Executive.

1st endorsement.

EXECUTIVE MANSION,
WASHINGTON, *January* 22*d*, 1877.

The within request is approved and the reservation is made accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

U. S. GRANT.

3009.

WAR DEPARTMENT,
WASHINGTON CITY, *May* 29, 1878.

To the President.

SIR: In accordance with recommendation of the commanding general department of the South, concurred in by division commander, I have the honor to request that a military reservation at the post of Fort Brooke, Tampa, Florida, with boundaries as hereinafter described, may be duly declared and set apart by the Executive in lieu of the lands at that post reserved by executive order dated January 22d, 1877, to wit:

Beginning at the intersection of the line which bounds the
114 town of Tampa on the south with the Hillsborough river, running thence along *said* the line which bounds the town of Tampa on the south and in prolongation thereof north 68 degrees 45 minutes east 2,976.8 feet; thence north 4 degrees 28 minutes west 2,342 feet; thence north 38 degrees east 1,052 feet; thence south 52 degrees east 459.2 feet; thence south 38 degrees west 1,052 feet; thence south 4 degrees 28 minutes east 1,931 feet; thence south 5 degrees 29 minutes east 2,007.2 feet, to Hillsboro bay; thence westerly along the shore of Hillsboro bay and the shore of Hillsboro river to the place of beginning, containing 155 and one-half acres, more or less.

A plat of the reservation and report and notes of survey by Lieutenant James C. Bush, 5th artillery, are enclosed herewith.

I have the honor to be, sir, with great respect,
Your obedient servant, GEO. W. McCRARY,
Secretary of War.

On the back of the foregoing is endorsed:

WAR DEPARTMENT,
WASHINGTON, *May* 29, 1878.

Secretary of War—

Requests that a military reservation, with boundaries as herein described, be duly declared and set apart by the Executive at Fort Brooke, Tampa, Florida, in lieu of the reservation made at that post by executive order dated January 22, 1877.

115 Encloses plat of reservation, together with report and notes of survey by Lieutenant James C. Bush, 5th artillery.

1st endorsement.

EXECUTIVE MANSION, *May* 29, 1878.

The within request is approved and the reservation is made and proclaimed accordingly.

The Secretary of the Interior will cause the same to be noted in the General Land Office.

R. B. HAYES.

The (entire) foregoing is endorsed on back as "Exhibit B."

116 STATE OF FLORIDA, }
Hillsborough County. }

I, Warren A. Givens, clerk of the circuit court of the State of Florida, sixth judicial circuit, in and for the county of Hillsborough, do hereby certify that the foregoing pages, numbered from one to —, inclusive, constitute a true copy of all of the proceedings and a correct transcript of the record of the judgment in the case of George F. Drew, plaintiff, and James Johnson, defendant, as appears upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this the ninth day of January, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] WARREN A. GIVENS,
Clerk of the Circuit Court for the County of Hillsborough, Florida,
By W J. ALLEN, *D. C.*

117 And afterwards, to wit, on the 17th day of January, A. D. 1890, came the appellant and filed herein his petition of appeal from the judgment of the said circuit court of the State of Florida, adjudging a nonsuit; which said petition of appeal or assignment of errors is in the words and figures as follows, to wit:

In the Supreme Court of Florida, January Term, A. D. 1890.

JAMES JOHNSON, Appellant, } Appeal from Hillsborough County,
vs. 6th Judicial Circuit of Florida.
GEORGE F. DREW, Appellee. }

Petition of Appeal.

To the honorable the judges of the supreme court of Florida:

James Johnson, the appellant, prays the court to revise the judgment rendered in the said case in the circuit court of Hillsborough county, in the 6th judicial circuit of Florida, on the following grounds, to wit:

1. Because the court below erred in sustaining the demurrer of the plaintiff to the equitable plea number 2 filed by the defendant in the court below.

2. Because the court below erred in refusing to allow de-
118 fendant to file his amended equitable plea, holding that the same is not a sufficient plea on equitable ground.

3. Because the court below erred in refusing to admit as evidence in said case certain transcripts, records, documents, and correspondence and executive orders relating to the Fort Brooke military reservation, marked Exhibits "A" and "B," duly authenticated under the signatures of Commissioners of the General Land Office thereto attached, which were offered in evidence by defendant's counsel.

4. Because the court below erred in admitting in evidence the patent set out in the record in behalf of the plaintiff and against the objection of defendant's counsel.

5. Because the court below erred in refusing to allow the defend-

ant to prove the character of his possession and occupancy of the land in question, the same being a material enquiry upon the issues in said cause.

6. Because the said court erred in refusing to allow the defendant to impeach the validity of said patent by proving that the defendant was in actual possession of the land in question at the time when the "Valentine" scrip was located by said Louis J. Brush upon said land, and that said patent was illegally issued to said Brush because the defendant was then in occupancy of the same, living on the same as his home and endeavoring to perfect his title to the same under the public land laws of the United States in good faith, and that said land at the time of the location of said Valentine scrip upon it and at the time of the issuance of said patent was
119 not unoccupied and unappropriated public lands of the United States, then refusing to allow the defendant to impeach said patent by showing that the same was issued in violation of the act of Congress which created said scrip, to wit, "the act of Congress of April, 1872."

7. Because the court below erred in refusing to allow the defendant to prove that at the commencement of said suit as well as at the time of the trial of said case in the court below the defendant was in the actual occupancy and possession of said land in conformity to the act of Congress approved July 5th, 1884, and that the plaintiff at the time of the commencement of the suit and of the trial did not have the right of possession of said land, but that an inchoate equitable right under said act of Congress of July 5th, 1884, was in the defendant.

8. Because the court below erred and misled and confused the jury by excluding such evidence as tended to show facts set up in said equitable plea and in said amended equitable plea, thus denying the defendant any defense to said action either under the general issue or upon equitable grounds claimed by the defendant under the act of Congress of April, 1872, and of July 5th, 1884.

9. Because the court below erred in refusing to allow counsel to use a deed book of deeds officially kept by the clerk of said circuit court as evidence in his behalf, and because the ruling of said court and the language then used by the court rebuking the clerk for producing said record had a tendency to create a prejudice in the minds of the jury against the defendant and his counsel
120 and to embarrass the counsel for the defendant in the premises.

10. Because the court below erred in refusing to give to the jury the charges numbered 2nd, 3rd, 4th, and 5th and 6th as requested by defendant's counsel.

11. Because the court below erred in giving the charges asked for by the plaintiff's counsel numbered 1st, 2nd, 3rd, 4th, and 5th.

12. Because the court below erred in refusing to grant the defendant a new trial upon the grounds set up in his motion for new trial.

Respectfully submitted.

LUCIUS FINLEY AND
S. Y. FINLEY,
Attornies for Appellant.

121 And afterwards, to wit, on the 9th day of July, A. D. 1890, came the parties, both appellant and appellee in said cause, by their respective counsel, and submitted this cause to the said supreme court upon the said transcript of the record and upon briefs and oral arguments; which entry of submission is in words and figures as follows, to wit:

JAMES JOHNSON, Appellant,
vs.
GEORGE F. DREW, Appellee.

This cause is this day submitted to the court by counsel for both parties upon briefs and oral arguments, but the court not being advised of its judgment to be given in the premises, it is ordered that time be taken to consider thereof.

And at a subsequent day, to wit, on the 19th day of July, A. D. 1894, judgment was rendered by the said supreme court of the State of Florida in words and figures as follows, to wit:

JAMES JOHNSON, Appellant,
vs.
GEORGE F. DREW, Appellee.
} Upon Appeal from a Judgment of the Circuit Court within and for the County of Hillsborough.

This cause having been submitted to the court at a previ-
122 ous term thereof upon a transcript of the record of the judgment aforesaid and the argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be, and is hereby, affirmed; and it is further ordered that the appellant do pay the costs of this proceeding, taxed at the sum of eighteen $\frac{60}{100}$ dollars, all of which is ordered to be certified to the court below.

The opinion of the court in this cause was this day read by Mr. Justice Mabry and ordered to be filed; which said opinion is in words and figures as follows, to wit:

123 In the Supreme Court of Florida, June Term, A. D. 1894.

JAMES JOHNSON, Appellant,
vs.
GEORGE F. DREW, Appellee.
} Hillsborough County.

MABRY, *J.:*

Appellee brought ejectment against appellant to recover possession of lot eight (8) of section nineteen, township twenty-nine south, of range nineteen east, and lot seven (7) of section twenty-four, in township twenty-nine south, of range eighteen east, containing in all 40.19 acres, and obtained judgment.

The defendant below filed the plea of not guilty and a plea on

equitable grounds. A demurrer was sustained to the latter plea and an amended plea on same ground was offered to be filed, but was refused by the court for the reason assigned, that it presented no equitable defense. A consideration of the merits of the amended plea will suffice to dispose of the errors assigned in the rulings of the court in reference to the equitable pleas.

124 The amended plea offered to be filed alleges in substance that the land sued for was situated within the Fort Brooke military reservation of the United States, at Tampa, Florida, and that the plaintiff claimed title to the same by virtue of a patent predicated upon a pretended location and entry on the land made in the United States land office at Gainesville, Florida, by Louis J. Brush, plaintiff's grantor, with Valentine scrip; that at the time of the said location and entry of said land and at the time of the issuance of the patent to Brush the defendant was in actual occupancy and possession of said land and was residing upon it with his family as a home; that defendant had settled upon and was in the actual possession of said land, it being a portion of said Fort Brooke military reservation, prior to the location of said reservation in the year 1877 and prior to the location of said reservation upon said reservation in the year 1878, and had settled thereon prior to January first, 1884, in good faith for the purpose of securing a home and of entering the same under the general laws of the United States, and continued in such occupancy from a period prior to the first day of January, 1884, to the time of the approval of the act of Congress of July 5th, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience is entitled to the exclusive right of possession thereof; that at the time of the said pretended location and entry of said land with Valentine scrip by plaintiff's grantor and the issuance of said patent to him said land was occupied by defendant as aforesaid, and was appropriated, and was not

125 then and is not now unoccupied and unappropriated public land of the United States, as required, specified, and limited by the act of Congress in such case made and provided in authorizing the location of said scrip; that at the time of the said pretended entry of said land and the issuance of said patent to plaintiff's grantor said land had not been surveyed under the direction and control of the General Land Office of the United States, and that said entry was made upon tracts less than the subdivisions provided for in the United States land laws and did not conform to the general system of the United States land survey; that at the time of the entry of said land with Valentine scrip and the issuance of the said patent to the plaintiff's grantor said land was within the jurisdiction of the War Department of the United States and not within the Land Department, and defendant alleges that said patent is in fraud and violation of the acts of the Congress of the United States and of the rights of the War Department, and that said patent is void and vests no legal or equitable title nor right of possession in and to said land in plaintiff, and that defendant, by virtue of said acts of Congress and in equity and good conscience,

is entitled to the exclusive possession of the said land mentioned in plaintiff's declaration.

It will be seen by reading the foregoing plea that while the issuance of a patent on a location and entry of the land with Valentine scrip is admitted, one purpose is to impeach the patent on the ground that the land was reserved and not subject at the
126 time to be entered by such scrip. Before examining the allegations of this plea, reference will be made to the acts of Congress on the subject, and also to some decisions bearing on the character of the defense sought to be made by the plea.

In April, 1872, Congress passed an act authorizing the ninth circuit court of the United States for California to hear and decide upon the merits of the claim of Thomas B. Valentine, under a Mexican grant to Juan Miranda, to a place called the Rancho Arroyo de San Antonio, situated in Sonoma county, State of California, with right of appeal to the Supreme Court of the United States. It was also provided in said act that any decree that might be obtained in favor of said claim should not affect any adverse right or title to the lands described in the decree; but in lieu thereof the claimant or his legal representatives might select and should be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of the United States land surveys, and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, was authorized to issue scrip, in legal subdivisions, to Valentine or his legal representatives, in accordance with the provisions of the act, provided that no decree in favor of Valentine should be executed or be of any force or effect
127 against any person or persons, nor should any land scrip or patents be issued as therein provided unless Valentine should first execute and deliver to the Commissioner of the General Land Office a deed conveying to the United States all his right, title, and interest to the lands covered by the said Miranda grant. The scrip located upon the land in question and for which the patent issued was the Valentine scrip authorized to be issued by the act above mentioned.

In August, 1856, provision was made by an act of Congress as follows: "That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be and are hereby placed under the control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States; provided, that said lands shall not be so placed under the control of said General Land Office until said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior in writing shall be filed and recorded." Chapter 129, act of August 18th, 1856. This act was repealed in 1884, and provision made by the repealing

act that whenever, in the opinion of the President of the United States, the lands or any portion of them included within the limits of any military reservation theretofore or thereafter declared have become or shall become useless for military purposes he shall
128 cause the same, or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as provided in the act and shall cause to be filed with the Secretary of the Interior notice thereof. Provision was also made for the Secretary of the Interior to have the said lands or any part of them surveyed or subdivided into tracts of less than forty acres and into town lots or either or both, and also for an appraisement and public sale of said lands, and after offering them at public sales to allow the remaining to be taken by private entry on conditions prescribed. This act contains the following provisos: "Provided that any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the Government surveys and subdivisions; provided further, that said lands were subject to entry under the public land laws at the time of their withdrawal." Chap. 214, acts of 1884.

The right to interpose a plea on equitable grounds in an action of ejectment is clear, provided the matter set up in such plea will authorize the defendant to enjoin in a court of equity the judgment, should one be recovered against him. The facts alleged in
129 such plea must not, however, make such a defense as is available to the defendant in the common-law action, as the court in such case will be justified in refusing to allow the plea to be filed or in striking it out if filed. Dickson *v.* Gamble, 16 Fla., 687; Spratt *v.* Price, 18 Fla., 289; Walls *v.* Endel, 20 Fla., 86; Johnston *v.* Allen, 22 Fla., 224. Does the plea set up any defense; and, if so, is it available to the defendant under the general issue in an action of ejectment? A patent in due form of law, sufficient on its face to convey the title to the land therein described and purporting to have been issued by the proper officers of the Government, must at least be regarded as *prima facie* valid in actions at law. Whether such a patent can be impeached in a proceeding at law as distinguished from a suit in equity, and, if so, under what conditions it can be done, has given rise to considerable judicial discussion in the courts of this country. The case of Polk's Lessee *v.* Wendal, 9 Cranch, 87, if not the first, is the leading case on the subject in the Supreme Court of the United States. Without going into a discussion of the various cases on the subject since that time, it may be stated that when patents purporting to have been issued under authority of the United States Government are shown to have been issued without authority of law, as in cases where the land undertaken to be conveyed had never been subject to its control and dis-

position, or, if so, had been withdrawn from sale when the patent issued or had in fact never belonged to the Government, such patents are void, because the officers issuing them had no
130 authority at all to make the grant. In such cases the patents are absolutely void, and their invalidity may be shown as a defense in an action at law for the possession of the land. Doolan *v.* Carr, 125 U. S., 618, and authorities cited; Knight *v.* United States Land Association, 142 U. S., 161; Foss *v.* Hinkell, 78 Cal., 158; Wilcox *v.* Jackson, 13 Peters, 498. If the patent is not absolutely void, but voidable, then it seems direct proceedings will be required in a proper case and on proper proceedings to have the patent declared void. In Johnson *v.* Towsley, 13 Wallace, 72—a bill in chancery to cancel a patent where two had been issued for the same land—the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties the decision of that tribunal, within the scope of its authority, is conclusive upon all others until reversed in a direct proceeding was referred to, and it was said "that the action of the Land Office in issuing a patent for any of the public land subject to sale by pre-emption or otherwise is conclusive of the legal title must be admitted under the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no enquiry can be permitted into the circumstances under which it was obtained." It was also said in the same case: "On the other hand, there has always existed in the courts of equity the power in certain classes of cases to enquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the
131 result of that action may assume when it invades private rights, and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the Crown or other executive branch of the government have been corrected or declared void or other relief granted. No reason is perceived why the action of the Land Office should constitute an exception to this principle." In Steel *v.* Smelting Company, 106 U. S., 447, it is said, after referring to several cases discussing the legal effect of a patent regularly issued, that "it need hardly be said that we are here speaking of a patent issued in a case where the Land Department had jurisdiction to act, the lands forming part of the public domain and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorizing their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action. In that respect the patent would be like the deed of an individual, which would be inoperative if he never owned the property or had previously conveyed it or had dedicated it to uses which precluded its sale." The case of Porter *v.* Bishop, 25 Fla., 749, 6 South. Rep., 863, holds that in entries under the United States homestead laws,

where only questions of fact or mixed questions of law and fact are involved, the decision of the Secretary of the Interior thereon is final, but that where by misconstruing the law the officers of
132 the Land Department have withheld from a party his just rights or where misrepresentation and fraud have been practiced necessarily affecting their judgment the courts may, in a proper proceeding, interfere and refuse to give effect to their action. The action of the Land Office in disposing of land subject to sale under any law regulating the disposition of the public domain is conclusive of the legal title so far as an enquiry into all matters connected with the issuance of the patent extends, and such patent is also conclusive in equity until set aside in a proper proceeding on the ground that the land officers have misconstrued the law or that their judgment has been so affected by misrepresentation or fraud as to deprive a party of his just rights.

The Supreme Court of the United States clearly holds, as we understand it, that if the land patented was not under the control and subject to disposition of the land office the patent was void, and its invalidity may be shown in an action of ejectment to recover the land by virtue of the patent. The act of Congress of 1872, authorizing the issuance of the Valentine scrip, provides that patents may issue for it for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, whether surveyed or not, in tracts not less than the subdivision provided for in the United States land laws, and, if unsurveyed when taken, to conform when surveyed to the general system of the United
133 States land surveys. The plea alleges that the land sued for and entered with Valentine scrip was situated within Fort Brooke military reservation, at Tampa, and at the time of said entry and the issuance of said patent to plaintiff's grantor the land was within the jurisdiction of the War Department of the United States and not within the Land Department. It is also alleged that the patent was in fraud and violation of the acts of Congress and of the rights of the War Department and was void, but this allegation of fraud must be taken as referring to the issuance of the patent when the land was within the jurisdiction of the War Department and not subject to the control of the Land Office Department. As an independent allegation of fraud, it would be nothing but a legal conclusion of the pleader. There is also an allegation that when the entry was made and the patent issued defendant was in possession of the land, and that it was not then or at the time of filing the plea unoccupied and unappropriated public land, as specified by the act of Congress authorizing the location of land with Valentine scrip. The allegation that the land was not unoccupied public land is based upon the alleged fact that defendant was in possession, but the further allegations that the land was situated within Fort Brooke military reservation and at the time of the entry and issuance of the patent was within the jurisdiction of the War Department and not within the Land Department are sufficient, in our opinion, to show, if true, that the land officers had no authority to permit the land to

be entered with the Valentine scrip. The act of Congress in
134 force up to July 5th, 1884, authorized a transfer of the land by the Secretary of War to the Land Department under certain conditions, and the patent alone would afford *prima facie* evidence that the proper transfer had been made before the issuance of the patent. The allegations of the plea, if true, negative such fact and show that the land was still under the control of the War Department when the patent was issued. Under such circumstances the land officers had no authority to issue the patent, and, under the rule above announced, it would be void and subject to attack in an action at law. The allegation that when the patent issued the land had not been surveyed and the entry was made upon tracts less than the subdivisions provided for in the United States land laws does not aid the plea. The scrip referred to was authorized to be located upon any unoccupied and unappropriated public land, not mineral, whether surveyed or not, but the survey, when made, is required to conform to the general system of United States land surveys. If the land was not under the control of the Interior Department, as alleged, the land officers had no authority over it and their action in undertaking to dispose of the land was void. If it were shown that the land office had authority to dispose of the land, a question would arise as to whether or not the matter of surveys belongs exclusively to that department. Cragin *v.* Powell, 128 U. S., 691; Knight *v.* United States Land Association, *supra*. Conceding that the defendant was in a position to attack the patent, all the available defense sought to be set up by the equitable plea could, in our judgment, be relied upon as a legal defense under the general issue,
135 and the court did not err in refusing to allow such plea to be filed.

So far we have considered the plea on the theory that the defendant was shown to be in a situation to attack the patent on the ground that it was void. He bases his right to the land on a settlement and occupancy of the land under the act of Congress of July 5th, 1884, and his right to make a homestead entry, and it will be observed that the rights given to the settler in the first proviso in this act *is* coupled with a further proviso that the land was subject to entry under the public land laws at the time of *their* withdrawal. The actual occupancy of the land by the defendant is alleged as well as his right to make a homestead entry and to enter the land, but there is no distinct allegation that the land was subject to entry under the public land laws at the time of its withdrawal.

The question of defendant's right to attack the patent is involved in the further questions presented on the trial under the general issues, and we will consider it in connection with them.

On the trial a patent for the land described in the declaration to Louis J. Brush, bearing date September 13th, 1882, was offered in evidence by the plaintiff and objected to by the defendant, but the objection was overruled and the patent admitted in evidence. There was no error in admitting the patent. It recited that it was issued

upon a location of the land in the district of lands subject to
136 sale at Gainesville, Florida, with scrip issued by virtue of the act of Congress in 1872 in favor of Thomas B. Valentine, and was in due form. The patent was at least *prima facie* evidence of a good conveyance of the land, and in the absence of anything to impeach it should have been admitted in evidence. A deed from Brush and wife conveying the land to plaintiff was then introduced without objection.

Defendant offered as documentary evidence certified copies of what purports to be official communications between the Secretary of War and the Secretary of the Interior, commencing in 1860, in reference to Fort Brooke reservation, at Tampa, and also the approvals of the President of the United States in 1877 and 1878 of the request of the Secretary of War in reference to said reservation. The purpose *for* introducing this evidence was to show that the land described in the patent was a part of the military reservation of Fort Brooke, at Tampa, when the patent was issued. On objection of plaintiff the documentary evidence was excluded, and defendant excepted. Defendant then testified that he was a native-born citizen of the United States and the head of a family, and offered to show that he settled upon the land in question prior to the issuance of the patent and was actually occupying said land on the first day of January, 1884, and continued to occupy it up to the date of the act mentioned, and that his settlement and occupancy of the land was for the purpose of entering it under the homestead laws of the United States. The record shows that some evidence offered by defendant to show his occupancy of the land was admitted, but it
also shows that the court excluded most of the testimony
137 offered by defendant on this point. There was no effort to show that defendant had ever obtained any certificate of entry of the land from the land office, or that he had any deed or paper evidence of title of any kind to the land from any source whatever. Testimony was offered tending to show that in July, 1883, defendant made some effort to make an application at the local land office for the land, and also consulted a party as to how he should proceed to make the application, and did in fact make an affidavit that he was residing upon Fort Brooke reservation before a judge and forwarded it to Washington. The circuit judge refused to admit testimony offered by defendant to show occupancy of the land either before or subsequent to January first, 1884, for the purpose of entering it under the homestead laws or otherwise, and the rulings of the court rejecting such evidence were excepted to by the defendant. This testimony offered by the defendant and ruled out by the court was objected to, among other grounds, because the defendant had not shown that he was in a situation to attack the patent offered in evidence by the plaintiff. Without considering the other grounds of objection to the testimony or the views of the circuit court in passing thereon, we think the objection mentioned was good, and it is decisive of the entire defense sought to be interposed by the defendant. There is doubt whether the documentary evidence offered by the defendant shows that the particular lots of land described in the

declaration were embraced in Fort Brooke reservation when the patent was issued, but without going into either the compe-
138 tency or relevancy of this evidence we do not see how the defendant can call in question the validity of the patent on the showing he made.

The rights given to the settler of any part of a military reservation by the act of July 5th, 1884, were upon the condition that said land was subject to entry under the public land laws at the time of their withdrawal. There was no showing made or offered to be made that the Fort Brooke reservation, at Tampa, was ever subject to entry under any of the public land laws when it was withdrawn for a reservation. If it had never been subject to such entry the defendant could acquire no rights by virtue of the act mentioned to enter the land under the general laws, as Congress had not secured to him such right by said act in providing for the disposition and sale of military reservations. At most he was an occupier of lands of the United States without any right of entry and without any authority of law. We have been unable to find any authority to sanction the view that a mere trespasser upon public land has the right to question the legality of a patent issued by the United States land officers. The case would be entirely different if a settlement should be made upon public land subject to entry under the provisions of law, and we find cases holding that inchoate rights acquired under such an entry will be protected even against a patent issued in violation of such a settler's rights. In the case of Doolan *v.* Carr, *supra*, which was an action of ejectment, and in which the right to attack a patent issued for the land in question was recognized,
139 it appears that the defendants had entered upon the land under a claim of pre-emption settlement and had made and subscribed declaratory statements of intention to pre-empt the land and presented them to the register of the proper land office, but they were refused on the ground that the land had been patented to a railroad company. The land was not subject to disposition by the land office when the patent was issued, being then embraced in a Mexican grant, but had been transferred to the Interior Department, and was subject to entry when the pre-emption claim was made. Winona & St. P. L. Co. *vs.* Ebilcisor, 52 Minn., 312. In the case before us there was no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by homestead entry, or that the defendant had acquired any right, inchoate or otherwise, to enter the land. The defendant's claim is not shown to have been in privity with the Government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a mere trespasser upon the land. As such we do not think he can be heard to question the legality of the patent issued by the land office. The case of Reynolds *v.* Iron Silver Mining Co., 116 U. S., 687, involving the validity of a patent under a placer-mine claim, decides that as the title in the veins of mineral lands known to exist and not claimed or referred to in the patent remains in the United States, the patentee had no right to dispossess one in peaceable possession of such veins, whether the

latter have any title or not. An examination of the case
140 will show that it did not involve the admission of proof to invalidate a patent, but whether the vein or lode, the subject of controversy, was included in the boundaries of the claim as located on the surface and extending vertically downwards if known to exist when the patent issued. In Cooper *v.* Roberts, 18 Howard, 173, a defendant in possession of land without any title or valid right to acquire one set up as one defense to a patent issued by the State of Michigan for the land that the officers of the State violated a statute in granting the land after it was known or might have been known to contain minerals, and it was said by the court that "without a nice enquiry into these statutes to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known or might have been known to contain minerals, we are of the opinion that the defendant is not in a condition to raise the question on this issue. The officers of the State of Michigan, embracing the chief magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land to which her title is attached." It was held in Doll *v.* Meador, 16 Cal., 295, that a patent not void upon its face cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title. Foss *v.* Hinkell, *supra*, holds that a
141 settlement by one as pre-emptor on land in compliance with the laws of the United States with a right to make the entry is in privity with the United States, and can question the validity of the issuance of a patent to a third party for the land. *Vide* also Southern Pacific R. R. Co. *v.* Purcell, 77 Cal., 69, where it was decided that a mere possession of public land does not give any right as against the Government or prevent it from disposing of the land as it pleases. The defendant not being in a situation to call in question the patent issued to plaintiff's grantor, the court did not err in excluding the evidence offered for such purpose.

This conclusion is also decisive of the questions presented here on the giving and refusing to give instructions to the jury. The plaintiff was entitled to recover the land sued for on the showing made, and the court did not err in refusing to give the charges asked by the defendant. There was no testimony before the jury to authorize the charges requested by the defendant and refused.

No objection was made to the introduction of the deed from Brush, the patentee, to the plaintiff, and it is not necessary to consider any questions arising under this conveyance.

There is only one other assignment of error which we deem it necessary to refer to in this opinion, and that is, the court erred in refusing to permit defendant to introduce the original record of a deed from the plaintiff to Walter B. Clarkson for the land in dispute. The purpose in offering this deed in evidence was to
142 show that the plaintiff did not have title to the land at the time of trial. The original record book was objected to be-

cause the original deed was not accounted for, and the record offered was not a certified copy of the deed, so as to permit the introduction of a copy in lieu of the original deed. The court refused to permit the original record from the record book to be read in evidence. The constitution, article XVI, section 21, provides that deeds and mortgages which have been proved for record and recorded according to law shall be taken as *prima facie* evidence in the courts of this State without requiring proof of execution, and that the certified copy of the record of any deed or mortgage that has been or shall be duly recorded according to law shall be admitted as *prima facie* evidence thereof and of its due execution with like effect as the original when duly proved, provided it be made to appear that the original is not within the custody or control of the party offering such copy. Under this provision a duly recorded deed would be *prima facie* evidence in the courts of this State without proof of execution, and a certified copy of such duly recorded deed would likewise be *prima facie* evidence, provided it is made to appear that the original is not within the custody or control of the party offering the copy; but it is entirely clear that the provision referred to does not authorize the introduction of the original record as evidence of the existence and execution of the original deed. The court did not err in refusing to allow the original record of the deed to be read in evidence on the objections made.

143 It is our opinion that the judgment appealed from in this case should be affirmed on the record before us, and it will be so ordered.

Head-notes in the foregoing opinion were filed, which were in the following words and figures, to wit:

In the Supreme Court of Florida, June Term, A. D. 1894.

JAMES JOHNSON, Appellant,
vs.
GEORGE F. DREW, Appellee.
} Hillsborough County.

MABRY, *J.:*

1. A plea on equitable grounds may be interposed in an action of ejectment, provided it sets up matters not available as a legal defense and which would authorize the defendant to obtain relief in equity by injunction against the judgment in ejectment.

144 2. It will not be error to refuse an application to file a plea on equitable grounds if the defense sought to be set up in the plea can be made available as a legal defense under the general issue.

3. A patent purporting to have been issued by the Land Office under authority of law and regular on its face is evidence of a good conveyance of the land therein described; but it may be shown in an action of ejectment for the possession of the land that the Land Office Department did not in fact have authority to issue the patent, and that the land undertaken to be conveyed had never

been subject to disposition by that department, or, if so, had been withdrawn from sale before the patent issued. In such a case the patent will be void, and its invalidity may be shown as a defense in an action at law for the possession of the land.

4 A patent issued by the Land Office Department for any portion of the public lands is at least *prima facie* evidence of the authority of that department to dispose of the land patented, and all matters passed upon and properly coming within the jurisdiction of the Land Department in granting the patent are conclusive until set aside by proper direct proceedings.

5. The right given by the act of Congress (chapter 214, Acts of 1884) to a settler upon a military reservation when entitled to make a homestead entry to enter one hundred and sixty acres in a body is dependent upon the fact that said land was subject to entry
145 under the public land laws at the time of its withdrawal; and when a settler upon a portion of a military reservation, without any certificate of entry or showing any privity with the title of the Government other than that of bare possession and claiming to enter the land under said act, seeks to defeat a patent to the land issued by the Land Office Department on the ground that he was in actual possession when the patent issued it is incumbent upon him to show that the land occupied by him was subject to entry under the public land laws at the time of its withdrawal for a military reservation.

6. A mere occupier of public land not shown to be subject to entry under any of the land laws of the United States and who does not base a claim to such land upon any title from any source or who does not connect himself in privity with any source of title is in no condition to attack a patent issued by the Land Office apparently valid and regular on its face.

7. The original record of a deed in the record book of deeds is not evidence to show a conveyance of the land described in the record book. Section 21 of article XVI of the constitution makes deeds and mortgages duly recorded *prima facie* evidence in the courts of this State without requiring proof of execution, and also certified copies of the record of deeds and mortgages that have been duly recorded shall be admitted as *prima facie* evidence thereof and of their due execution with like effect as the originals when duly proved, provided it is made to appear that the originals
146 are not within the custody or control of the party offering such certified copies, but the constitution has not made the original record itself without any other showing evidence of deeds or mortgages.

Judgment affirmed.

Lucius Finley and S. Y. Finley, for appellant.

Sparkman & Sparkman, for appellee.

I, James B. Whitfield, clerk of the supreme court of the State of Florida, do hereby certify *certify* that the foregoing pages, numbered from one to one hundred and forty-six, constitute a true and correct copy of the record of the proceedings and judgment, including the

opinion of the court, in the case of James Johnson, appellant, *vs.* George F. Drew, appellee, lately pending in the supreme court of Florida upon appeal from a judgment of the circuit court of the sixth judicial circuit of Florida.

Seal Supreme Court of the State of Florida.

In testimony whereof I hereunto set my hand and affix the seal of the supreme court of the State of Florida this the second day of February, A. D. 1895, at Tallahassee, the capital.

JAMES B. WHITFIELD,
Clerk Supreme Court, State of Florida.

147 *Bond.*

In the Supreme Court of the State of Florida.

JAMES JOHNSON, Plaintiff in Error,
vs.
GEORGE F. DREW, Defendant in Error.

Know all men by these presents that we, James Johnson and Annie E. Finley and W. H. C. Caruthers, are held and firmly bound unto George F. Drew, defendant in error herein, in the sum of five hundred dollars, lawful money of the United States of America, to — the said George F. Drew, his heirs, successors, and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each of us, jointly and severally, firmly by these presents.

In testimony whereof witness our hands and seals this the 15th day of July, A. D. 1896.

Whereas the above-named plaintiff in error is about to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of Florida in the cause entitled James Johnson *versus* George F. Drew: Now, therefore, the condition of this obligation is such that if the above-named James Johnson, the plaintiff in error, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

148 JAMES his x mark. JOHNSON. [SEAL.]
ANNIE E. FINLEY. [SEAL.]
W. H. C. CARUTHERS. [SEAL.]

Signed, sealed, and delivered in the presence of us as witnesses—
S. Y. FINLEY.
E. H. CARUTHERS.

UNITED STATES OF AMERICA, *State of Florida*, } *ss:*

Personally appeared Mrs. Annie E. Finley, surety on the above bond and a widow, who, being duly sworn, *each for himself and*

says that she is a freeholder in the State of Florida and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all debts and liabilities. I own the S. ½ of lot 1, B. 3, S. Tampa.

ANNIE E. FINLEY.
W. H. C. CARUTHERS.

Sworn to and subscribed before me this the 15th day of July, A. D. 1896.
[SEAL.]

CHAS. WRIGHT,
Clerk Ct. Ct.

The above bond is approved this July 15th, 1896.
CHAS. WRIGHT, *Clerk*,
By D. B. GIVENS, *D. C.*

149 The form of the above bond and the sufficiency of the sureties thereon are hereby approved.
MILTON H. MABRY,
Chief Justice Supreme Court of the State of Florida.

Endorsed: James Johnson *vs.* George F. Drew. Writ of error bond. Filed in supreme court July 17, 1896. J. B. Whitfield, clerk.

In the Supreme Court of the United States of America.

JAMES JOHNSON, Plaintiff in Error,
vs.
GEORGE F. DREW, Defendant in Error.
} Error to the Supreme Court of the State of Florida.

Assignment of Errors.

The said plaintiff in error, by S. Y. Finley, his attorney, now specifies and assigns the following error:

1st. The said supreme court of Florida erred in affirming the judgment of the circuit court of Hillsborough county, Florida, in the case wherein the said George F. Drew was plaintiff in ejectment and the said James Johnson was defendant upon the appeal to the said supreme court of the State of Florida by the said James Johnson from a judgment in ejectment rendered by said circuit court in said cause in favor of the said George F. Drew, as plaintiff, and against the said James Johnson, as defendant.

150 2nd. And also that the said supreme court of Florida erred in its ruling sustaining the ruling of the judge of the circuit court of Hillsborough county, Florida, sustaining the plaintiff's demurrer to the defendant's equitable plea filed therein and refusing to allow the defendant to file the amended equitable plea shown by the record in this cause, and the supreme court of Florida also erred in its opinion and judgment in this, that the said supreme court of Florida sustained the ruling of the judge of the court below in pre-

cluding the plaintiff in error, who was the defendant in said action of ejectment, from interposing any of the grounds of defence set up in said equitable and amended equitable plea, and in refusing to allow the said defendant, on the trial of said cause, to prove that he was in actual occupancy of the land involved in said suit at the time the plaintiff grantor located and entered the same with Valentine scrip, and in refusing to allow the said defendant to prove by documentary evidence from the Land Department and the War Department of the United States that at the time of the entry thereof by the plaintiff grantor with Valentine scrip the said land was appropriated by the United Ssates Government as a military reservation.

3rd. And that the said supreme court of the State of Florida erred in denying to the plaintiff in error the right to impeach the patent under which the said George F. Drew, as plaintiff in ejectment, by showing that the land in question at the time said patent was issued was in the possession and occupancy of the plaintiff in error, claiming and occupying the same under the public land laws of the United States, and in denying the right of the plaintiff in error to impeach said patent by proof that said patent was illegally
151 issued by the Land Department of the United States upon a location of Valentine scrip thereon whilst the same was under the appropriation of the United States as a military reservation, in violation of the act of Congress of April 5th, 1872.

4th. And also that the said supreme court of the State of Florida erred in denying to the plaintiff in error the rights claimed by him in his said amended equitable plea under the act of Congress of July 5th, 1884.

5th. And also that the said supreme court of Florida erred in denying the right to the plaintiff in error, as defendant in said action of ejectment, to prove his occupancy of said land and his *bona fide* possession of said land under the public land laws of the United States at the time said land was entered with Valentine scrip and at the time said patent was issued to the plaintiff's grantor and at the time said suit in ejectment was commenced, and in holding that the claim of the plaintiff in error was not shown to be in privity with the Government, and that he was a mere trespasser on said land and as such could not be heard to question the legality of the issuance of said patent by the Land Department of the United States.

6th. And also that the said supreme court of Florida erred in refusing to reverse the judgment of the said circuit court of Hillsborough county, Florida, in said cause because of the erroneous charges given by said circuit court to the jury in behalf of the plaintiff, at the request of his counsel, as follows, viz:

(1st.) "That a patent from the Government of the United States is the highest evidence of title and is conclusive as against
152 the Government and all persons claiming under title acquired since the issuing of the patent until set aside or annulled or unless it is absolutely null and void."

(2nd.) "That in a suit of ejectment the holder of such a patent

must prevail against all other persons not having a legal title older than such a patent."

(3rd.) "And you are instructed that bare possession by — person of a tract of land at the time of the issuing of a patent to another person does not create any right in the person so in possession as against the patent held by such other person."

(4th.) "That if the jury believe from the evidence in the case that the plaintiff holds a patent from the Government of the United States for the land in controversy or is a grantee of a party who so holds a patent for the land from the Government of the United States, that they must find for the plaintiff unless defendant has produced in evidence a prior patent or a legal title of a date prior to the issuing of the patent of the plaintiff or his grantor."

(5th.) "That the bare possession of the defendant, although he may have been on the land prior to the issuing of the patent, does not entitle him to come into a court of law and defend as against such patent, nor does he by said possession acquire such right as would entitle him to question the legality of such patent."

(7th.) And also that the supreme court of Florida erred in refusing to reverse the judgment of the court below because the judge of said circuit court refused to charge the jury, as requested by the defendant's counsel, in the charges asked for by the defendant's counsel as follows:

(*Charge No.* 2 *Asked for by Defendant's Counsel.*)

153 "In this action before the plaintiff can recover it must be shown by the evidence, not only that the title to the land in question was at the commencement of this suit in the plaintiff, but also that the plaintiff had the right of possession at the time of trial."

8th. And also that the supreme court of Florida erred in affirming the judgment in the court below and in refusing to reverse the same on the ground that the judge in the court below refused to charge the jury, at the request of the defendant's counsel, as follows, to wit:

(4th.) "If you find from the evidence that the plaintiff derives title from Louis J. Brush, and that Louis J. Brush procured a patent from the United States for the land in question by the location of Valentine scrip thereon, and if you further find from the evidence that at the time of such location and purchase of the said land by the said Brush that said land was in actual possession of the defendant, and that the defendant was then occupying the same as his home, openly and notoriously claiming and cultivating and improving the same and exercising ownership thereof, then, in such case, the court charges you that such location and purchase of said land with Valentine scrip would be illegal, and as against the defendant in possession would not vest in said Brush nor the plaintiff, claiming under him, either the title or the right of possession in and to the land in question, and you should find for the defendant."

(*5th Charge Asked for by the Defendant's Counsel.*)

"If you find from the evidence that the plaintiff claims title through a patent issued to Louis J. Brush, and if you further find from the evidence that said patent was obtained with Valentine scrip located upon said land with said scrip by said Brush,
154 and if you further find from the evidence that at the time of such location of said land with Valentine scrip said land was not unappropriated land of the United States, then such patent would be illegally issued and would convey no title or right of possession to said Brush or to the plaintiff claiming under him."

(*6th Charge Asked for by Defendant's Counsel.*)

"If you find from the evidence that the patent upon which the plaintiff relies was illegally issued by the officers of the Land Department in violation of the act of Congress in such cases made and provided, and that the defendant was in actual occupancy of said land and settled thereon prior to January 1st, 1884, in good faith, for the purpose of securing a home, and entering the same under the general land laws of the United States, and has continued in such occupation of said land up to and including the 5th day of July, 1884, and up to the present time, and is by law entitled to make a homestead entry thereon, and that said land was a part of the Fort Brook military reservation, at Tampa, Florida, and that said lands were subject to entry under the public land laws at the time of their withdrawal, then you should find for the defendant."

9th. And also that the supreme court of Florida erred in affirming the judgment of the court below refusing to reverse the same on the ground that the judge of trial court excluded such evidence as tended to prove said equitable and said amended equitable plea.

10th. And also that the supreme court of the State of Florida erred in refusing to reverse the judgment of the court below on the ground that the judge of the trial court refused to grant the
155 defendant a new trial on the grounds set up in his motion for a new trial.

And for the errors aforesaid the said James Johnson prays that the said judgment of the supreme court of the State of Florida and the said judgment of the circuit court of Hillsborough county, Florida, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment of said courts.

SAMUEL Y. FINLEY,
Att'y for Plaintiff in Error.

Endorsed: Supreme court, State of Florida. James Johnson *vs.* George F. Drew. Assignment of errors. Filed in supreme court July 17, 1896. J. B. Whitfield, clerk.

156 JAMES JOHNSON, Appellant, vs. GEORGE F. DREW, Appellee. } Appeal from the Circuit Court for Hillsborough County.

I, James B. Whitfield, clerk of the supreme court of the State of Florida, by virtue of the attached writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to one hundred and fifty-five, inclusive, constitute a true and complete transcript and copy of the record and proceedings had in the supreme court of Florida in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in the office of the clerk of the supreme court of the State of Florida.

In testimony whereof I have hereunto set my hand and have affixed the seal of the supreme court of the State of Florida, at Tallahassee, the capital of Florida, in said State, this the thirteenth day of August, A. D. 1896.

Seal Supreme Court of the State of Florida.

JAMES B. WHITFIELD,
Clerk Supreme Court, State of Florida.

157 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James Johnson, plaintiff in error, and George F. Drew, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution
158 or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof,

that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

[Seal of U. S. Circuit Court, South. Dist. Florida.]

E. O. LOCKE,
Clerk of the Circuit Court of the United States
for the Southern District of Florida,
By H. L. CRANE,
Deputy Clerk.

Allowed by—
MILTON H. MABRY,
Chief Justice of the Supreme Court of Florida.

159 [Endorsed:] James Johnson, plaintiff in error, *vs.* George F. Drew, defendant in error. Writ of error. Filed in supreme court Jul- 17, 1896. J. B. Whitfield, clerk.

I, James B. Whitfield, clerk of the supreme court of the State of Florida, do hereby certify that on the seventeenth day of July, A. D. 1896, a copy of the within writ of error was lodged and filed in the office of the clerk of the supreme court of the State of Florida, at Tallahassee, the capital of Florida, in said State.

Seal Supreme Court of the State of Florida.

Witness my hand and the seal of the supreme court of the State of Florida, at Tallahassee, the capital, in said State, this August 13th, 1896.

JAMES B. WHITFIELD,
Clerk Supreme Court, State of Florida.

160 UNITED STATES OF AMERICA, *ss:*

To George F. Drew, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, in the District of Columbia, on the 16th day of August, A. D. 1896, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Florida, wherein James Johnson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Milton H. Mabry, chief justice of Florida, this 17th day of July, A. D. 1896.

[Seal Supreme Court of the State of Florida.]

MILTON H. MABRY,
Chief Justice Supreme Court, State of Florida.

Attest: JAMES B. WHITFIELD,
Clerk Supreme Court, State of Florida.

161 [Endorsed:] In the Supreme Court of the United States. James Johnson, plaintiff in error, *vs.* George F. Drew, defendant in error. Citation.

162 STATE OF FLORIDA, }
Alachua County. }

Personally appeared before the undersigned notary public E. E. Voyle, who is well known to the undersigned, and who, being by me duly sworn, on oath says that he served the foregoing citation (which was issued out of the supreme court of Florida in the case of James Johnson, plaintiff in error, *vs.* George F. Drew, the defendant in error) upon the said George F. Drew, the defendant in error, on the 25th day of July, A. D. 1896, by reading the original and delivering a true copy of this citation to Mrs. Amelia Drew, the wife of said George F. Drew and a member of his family, and over the age of twenty-one years, at the residence and usual place of abode of said defendant in error in Fernandina, Florida.

E. E. VOYLE.

Sworn to & subscribed before — this July 27, 1896.

[Seal of J. A. Ammons, Notary Public for the State of Florida.]

J. A. AMMONS,
Notary Public, State of Florida.

163 STATE OF FLORIDA, }
Hillsborough County. }

[Seal Supreme Court of the State of Florida.]

Personally appeared before the undersigned, notary public of the State of Florida at large, Samuel Payne, who, being duly sworn, on oath says that he served the foregoing citation, which was issued out of the supreme court of the State of Florida in the case of James Johnson, plaintiff in error, *vs.* George F. Drew, the defendant in error, upon S. M. Sparkman, of the firm of Sparkman and Sparkman, an attorney of record for the defendant in error, at Tampa, Hillsborough county, Florida, on this the 10th day of August, A. D. 1896, by delivering to him, the said att'y for the defendant
164 in error, a true copy of the said above original citation and showing him the original.

SAMUEL PAYNE.

Sworn to and subscribed before me this the 10th day of August, 1896.

{Seal of Charles E. Johnson, Notary Public, State of Florida at Large.}

CHARLES E. JOHNSON,
Notary Public, State of Florida.

I, James B. Whitfield, clerk of the supreme court of the State of Florida, do hereby certify that on the thirteenth day of August,

A. D. 1896, a copy of the foregoing citation and return *we;e* lodged and filed in my office at Tallahassee, Florida.

Witness my hand and the seal of the supreme court of the State of Florida, at Tallahassee, the capital, this August 13th, A. D. 1896.

JAMES B. WHITFIELD,
Clerk Supreme Court, State of Florida.

Endorsed on cover: Case No. 16,389. Florida supreme court. Term No., 239. James Johnson, plaintiff in error, *vs.* George F. Drew. Filed September 28th, 1896.

No. 239.

Brief of Finley for P. E.

Filed Dec. 9, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

Error to the Supreme Court of Florida.

James Johnson, Plaintiff in Error.
vs.
Geo. F. Drew, Defendant in Error.

BRIEF OF S. Y. FINLEY,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Error to the Supreme Court of Florida.

James Johnson, Plaintiff in Error.

vs.

Geo. F. Drew, Defendant in Error.

BRIEF OF S. Y. FINLEY,

Attorney for Plaintiff in Error.

STATEMENT.

Defendant in error George F. Drew, brought an action of ejectment in the Circuit court of Hillsborough county, Florida against the plaintiff in error, James Johnson, to recover possession of lot eight of section 19, Township 29, South Range 19 East; and lot 7 of section 24 in Town ship 29, South Range 18 East, situation in Hillsborough county Florida, and containing in all 40.19, acres of land. At the trial of said cause in said Circuit court the said George F. Drew, the plaintiff therein obtained judgment against the defendant in said Circuit court: The said James Johnson, appealed from the said judgment of the said Circuit court of Hillsborough county to the Supreme court of the State of Florida. The Supreme court of Florida affirmed the said judgment of the said Circuit court of Hillsborough county, Florida, a writ of error was applied for and granted for a review of said judgment and decision of the said Circuit and Supreme court of Florida by this, the Supreme court of the United States.

The defendant in said Circuit court, the plaintiff in error in this court, for defence in said action of ejectment filed the plea of "not guilty," and also a plea on equitable grounds. A demurrer was sustained to the latter plea, and an amended plea on the same grounds was offered to be filed in the same action in said Circuit court, but was refused by said Circuit court for the reason assigned, viz. "that it presented no equitable defense."

The Supreme court of Florida affirmed said judgment of said Circuit court upon a consideration of said amended equitable plea, which in substance, alleged as follows: That the land sued for was situated within the Ft. Brooke Military reservation of the United States at Tampa Florida, and that the plaintiff claimed title to the same by virtue of a patent predicated upon a pretended location and entry of the land in question made in the United States land office at Gainesville Florida by Louis J. Brush, the plaintiff's grantor, with Valentine scrip: that at the time of the said location and entry of said land and at the time of the issuance of the patent for the same to said Brush, the defendant was in the actual occupancy and possession of said land, and was residing upon it with his family, as a home, that the defendant had settled upon, and was in the actual possession of said land, it being a portion of said Ft. Brooke Military Reservation, prior to the location of said reservation in the year 1877, and prior to the location of the said reservation in the year 1878, and had settled thereon prior to January first 1884, in good faith for the purpose of securing a home, and of entering the same under the general land laws of the United States, and continued in such occupancy from a period prior to the first day of January 1884 to the time of the approval of the act of Congress of July 5th, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience is entitled to the exclusive right of possession thereoff; That at the time of the said pretended location and entry of said land with Valentine scrip by the plaintiff's grantor, and of the issuance of said patent to him, said land was occupied by defendant as aforesaid, and was appropriated, and was not then, and is not now, unoccupied and unappropriated public land of the United States, as required, specified and limited by the act of Congress in such cases made and provided, in authorizing the location of said script: that at the time of said pretended entry of said land and of the issuance of said patent to the plaintiff's grantor, said land had not been surveyed under the direction and control of the General Land Office of the United States, and that said entry

was made upon tracts less than the subdivisions provided for in the United States land laws, and did not conform to the general system of the United States land survey: that at the time of the said entry of said land with Valentine scrip, and of the issuance of said patent to the plaintiff's grantor, said land was within the jurisdiction of the war department of the United States, and not within the jurisdiction of the land department of the United States. And the defendant alleges that said patent is in fraud and violation of the acts of the Congress of the United States, and of the rights of the war department; and that said patent is void, and vests no legal or equitable title, nor right of possession in and to said land in the plaintiff; and that defendant, by virtue of said acts of Congress, and in equity and good conscience, is entitled to the exclusive possession of the said land mentioned in the plaintiff's declaration.

The plaintiff in error sought to defend said action of ejectment upon the grounds set up in said amended equitable plea The judge of said Circuit court would not allow said amended equitable plea to be filed on the grounds assigned by said Circuit court, that the same presented no equitable defense. And the Supreme court of Florida sustained the said Circuit court of Hillsborough county in denying to the plaintiff in error any protection by reason of the allegations in said plea contained.

Specification of Errors.

1st Error.—That the Supreme court of Florida erred in affirming said judgment of the said Circuit court of Hillsborough county, Florida, in said cause.

2nd Error.—That the Supreme court of Florida erred in sustaining the ruling of the Judge of the said Circuit court sustaining plaintiff's demurrer to defendant's equitable plea filed in said cause, and in refusing to allow the defendant to file the amended plea set out in the record, and said Supreme court of Florida erred in it's opinion and judgment in this, that it sustained the ruling of the Judge of the court below in precluding the plaintiff in error, who was defendant in the said action of ejectment, from interposing any of the grounds of defense set up in said equitable and amended equitable plea, and in refusing to allow the said defendant on the trial of said cause to prove that he was in the actual occupancy of the land involved in said suit at the time the plaintiff's grantor located and entered the same with Valentine scrip; and in refusing to allow the said defendant to prove by documentary evidence from the

land department and the war department of the United States, that at the time of the entry thereof by the plaintiff's grantor with Valentine scrip said land was appropriated by the United States government as a military reservation.

3rd error.—And that the Supreme court of Florida erred in denying to the plaintiff in the error the right to impeach the patent under which the plaintiff in the court below claimed title, by showing that the land in question at the time said patent was issued to the plaintiff's grantor was in the possession and occupancy of the plaintiff in error, claiming and occupying the same as his home, and endeavoring to perfect the same under the public land laws of the United States; and in denying the right of the plaintiff in error to impeach said patent by proof that the said patent was illegially issued by the land department of the United States upon a location of Valentine scrip thereon whilst the same was under the appropriation of the United States as a military reservation, in violation of the act of Congress of April 5th, 1872.

4th error.—And also that the Supreme court of the State of Florida erred in denying to the plaintiff in error the rights claimed by him in his said amended equitable plea under the act of Congress of July 5th, 1884.

5th, error.— And also that the said Supreme court of Florida erred in denying the right to the plaintiff in error, as defendant in said action of ejectment, to prove his occupancy of said land, and his bonafide possession of said lands under the public land laws of the United States. at the time said land was entered with Valentine scrip, and at the time said patent was issued to the plaintiff's grantor and at the time said action in ejectment was commenced;and in holding that the claim of the plaintiff in error was not shown to be in privity with the government, and that he was a mere trespasser on said land and, as such, could not be heard to question the legality of the issuance of said patent by the land department of the United States.

6th error.—And also that the Supreme court of Florida erred in refusing to reverse the judgment of the Circuit court of Hillsborough County, Florida, in said cause, because of the erroneous charges given by said Circuit court to the jury in behalf of the plaintiff at the request of plaintiff's counsel in words and figures as follows; viz: Charge No. 1 for the plaintiff. That a patent from the government of the United States is the highest evidence of titl and is conclusive, as against the government and all persons claiming

under title acquired since the issuing of the patent, until set aside or annulled or unless it is absolutely null and void."

2nd. Charge given for the plaintiff. "That in a suit of ejectment the holders of such a patent must prevail against all other persons not having a legal title older than such a patent." 3rd. Charge given for the plaintiff. And you are instructed that bare possession by a person of a tract of land at the time of the issuing of a patent to another person does not create any right in the person so in the possession as against the patent held by such other persons."

4th. Charge given for the plaintiff. That if the jury believe from the evidence in the case, that the plaintiff holds a patent from the government of the United States for the land in controversy, or is a grantee of a party who so holds a patent for the lands from the government of the United States that they must find for the plaintiff, unless defendant has produced in evidence a prior patent, or a legal title of a date prior to the issuing of the patent to the plaintiff or his grantor.

5th. Charge for the plaintiff. That the bare possession of the defendant, although he may have been on the land prior to the issuing of the patent, does not entitle him to come into a court of law and defend, as against such patent, nor does he by said possession acquire such right as would entitle him to question the legality of such patent.

7th, error.—And also the Supreme court of Florida erred in refusing to reverse the judgment of the Court below because the Judge of said Circuit court refused to charge the jury as requested by the defendants counsel as follows: viz. Charge No. 2, asked for by the defendants counsel and refused by the court.

"In this action before the plaintiff can recover it must be shown by the evidence, not only that the title to the land in question was at the commencement of said suit in the plaintiff, but also that the plaintiff had the right of possession at the time of the trial,"

8th, error.—And also that the Supreme court of Florida erred in affirming the judgment in the court below, and in refusing to reverse the same on the grounds that the Judge of the court below refused to charge the jury at the request of the defendants counsel, as follows; viz; Charge No. 4 requested by the defendant and refused by the court.

"If you find from the evidence that the plaintiff derives title from Louis J. Brush, and that Louis J. Brush procured a patent from the United States for the land in question

by the loction of Valentine scrip, thereon, and if you further find from the evidence that at the time of such location and purchase of the said land by the said Brush, that said land was in the actual possession of the defendant, and that the defendant was then occupying the same as his home, openly and notoriously, claiming and cultivating and improving the same, and exercising ownership thereof, then in such case, the court charges you that such location and purchase of said land with Valentine scrip would be illegal, and, as against the defendant in possession, would not vest in said Brush nor the plaintiff claiming under him, either the title or the right of possession in and to the land in question, and you should find for the defendant."

Charge No. 5. asked for by the defendants counsel, and refused by the court. "If you find from the evidence that the plaintiff claims title through a patent issued to Louis J. Brush, and if you further find from the evidence that said patent was obtained with said scrip by said Brush and if you further find from the evidence that at the time of such location of said land with Valentine scrip, said land was not UNAPPROPRIATED land of the United States; then such patent would be ILLEGALLY issued, and would convey no title or right of possession to said Brush, or to the plaintiff claiming under him."

Charge No. 6, asked for by the defendant's counsel, and refused by the court. "If you find from the evidence that the patent upon which the plaintiff relies was illegally issued by the officers of the land department in violation of the act of congress, in such cases made and provided, and that the defendant was in actual occupancy of said land, and settled thereon prior to January 1st. 1884, in good faith for the purpose of securing a home, and entering the same under the general land laws of the United States, and has continued in such occupancy of the said land up to, and including the 5th. day of July 1884' and up to the present time, and is by law entitled to make a homestead entry thereon, and that said land was a part of the Fort Brooke Military reservation, at Tampa Florida, and that said land were subject to the entry under the public land laws at the time of their withdrawal, then you should find for the defendant."

9th. error.—And also that the Supreme court of Florida erred in affirming the judgment of the court below, and in refusing to reverse the same on the grounds that the Judge of the trial court excluded such evidence as tended to prove said equitable pleas, viz. "That at the time of the entry

of said land by plaintiff's grantor, and of the issuance of said patent the defendant was in the occupancy of said land, and that the defendant settled upon said land in good faith prior to January 1st.1884, and continued in that possession up to, and including the 5th. day of July 1884 with the intention of making it his home and entering it under the general land laws of the United States. That the defendant was then qualified and entitled to make a homestead entry. and to enter said land. And that at the time of the location of said Valentine scrip on said land by the plaintiff's grantor. and at the time of the issuance of said patent to the plaintiff's grantor, and at the time of the commencement of the said suit and of the trial, the defendant was bonafide settler upon said land, and had an inchoate right to the same as against individuals, though not as against the government. And that said land was at the time of the issuance of said patent and of the location of said scrip under the jurisdiction and control of the war department of the United States and within the Fort Brooke Military reservation of Florida.

10th. error.—And also that the Supreme court of Florida erred in refusing to reverse the judgment of the court below on the ground that the judge of the trial court refused to grant the defendant a new trial on the grounds set up in his motion for a new trial.

Brief of Argument of Counsel for Plaintiff in Error.

In behalf of the plaintiff in error we first ask the consideration of the 1st, 2nd, 3rd, 4th, and 5th, grounds of error. (Record page 67 and 68.) These grounds taken together, embrace the substance of the law of the case, and involve the correctness of its disposition by the Circuit and Supreme court of Florida.

The plaintiff in error sought to defend said action of ejectment upon the grounds contained in his amended equitable plea. (See Record page 55.)

The Statute of Florida authorizes an equitable plea in actions of ejectment. (See McLellans Digest Laws of Florida, section 61, page 827) which reads as follows; "It shall be law ful for the defendant or plaintiff in any cause in any of the courts of this State in which, if judgment were obtained he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defense, and the said courts, are hereby empowered to receive such a plea, provided, such a plea shall begin with the words, "For defence on equitable grounds" or words to the like effect. Section 64, page 827. McClellans Digest which reads as follows. "In case it shall appear to the court or a Judge that any such equitable plea cannot be dealt with by a court of law. so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be struck out on such terms as to costs and otherwise as to such court or judge may seem reasonable."

The doctrine of the Supreme court of Florida as to an equitable plea in ejectment is stated and referred to in the Record on page 57, and on page 60 of the record the Supreme court of Florida held that all the available defense sought to be set up by the equitable plea could be relied upon as legal defence under the general issue. See Record page 60.

The question then recurs, does the said amended equitable plea referred to, page 55 of the record, set up a defense to the said action of ejectment. And if so, was the defendant in the court below in a situation to attack the patent offered in evidence by the plaintiff in the court below?

It is conceded that the plaintiff in the State trial court relied upon a patent for the land in question issued to Louis J Brush, as assignee of Thomas B. Valentine, by virtue of the act of Congress of April 5th, 1872. (See Record page 14, 15, 60 and 61.)

A brief statement of the terms and limitations of the said act of Congress will be found in the Record on page 56. See act of Congress approved April 5th, 1872.

The plain unequivocal terms of said act, limit the location of the scrip thereby created upon the UNOCCUPIED and UNAPPROPRIATED public lands of the United States, not mineral."

The plaintiff in error, as defendant in the State trial court, alleged in his said amended equitable plea, See page 55 of the Record) that the land in question "was situated in the Fort Brooke Military reservation of Florida, and that the plaintiff claimed title to said lands through a patent issued to Louis J Brush, the plaintiff's grantor. That the land sued for was situated within the Fort Brooke Military reservation of the United States, at Tampa Florida, and that the plaintiff claimed title to the same by virtue of the patent predicated upon a pretended location, and entry on said land made in the United States land office at Gainesville, Florida, by said Brush with Valentine scrip, that at the time of said location and entry of said land, and at the time of the said issuance of the said patent to the said Brush, the defendant was in actual occupancy and possession of the said land, and was residing upon it with his family as a home.

That defendant had settled upon, and was in the actual possession of the said land, it being a portion of said Fort Brooke Military reservation, prior to the location of said reservation in the year 1877, and prior to the said location of the said reservation in the year 1878, and had settled thereon prior to January first 1884 in good faith, for the purpose of securing a home, and of entering the same under the general land laws of the United States, and continued in such occupancy from a period prior to the first of January 1884, to the time of the approval of the act of Congress of July 5th, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience, is entitled to the exclusive right of possession thereof. That at the time of said pretended location and entry of said land with Valentine scrip by the plaintiff's grantor, and of the issuance of said patent to him, said land was occupied by the defendant as aforesaid and was appropriated, and was not then and is not now "Unoccupied and Unappropriated,' public land of the United States as required, specified and limited by the act of Congress (of April 5th, 1872) in such case made and provided which authorizes the location of such scrip, That at the time of the said pretended entry of said land and of the issuance of said patent to the plaintiff's grantor, said land had not been surveyed under the direction and control of the

general land office of the United States, and that said entry was made upon tracts of less than the subdivision provided for in the United States land laws, and did not conform to the general system of the United States land survey; that at the time of the entry of said land with Valentine scrip and of the issuance of said patent to the plaintiff's grantor, said land was within the jurisdiction of the war department of the United States, and not within the land department, and defendant alleged that said patent is in fraud and violation of the Acts of the Congress of the United States and of the right of the war department, and that said patent is void, and vests no legal or equitable title, nor right of possession in and to said land in the plaintiff and that defendant by virtue of said Acts of Congress, and in equity and good conscience, is entitled to the exclusive possession of said land mentioned in the plaintiff's declaration."

The evident purpose of the above plea was to impeach the patent under which the plaintiff in the court below claimed title, and thereby to defend the title and the right of possession of said land claimed by the plaintiff in said action of ejectment.

The State trial court denied the defendant the right to file said amended equitable plea, on the grounds, that it is not sufficient as a plea on equitable grounds. (See Record page 7.)

This was equivalent to sustaining a demurrer to said amended equitable plea. (See Record page 55.)

The Supreme court of Florida in commenting on said plea on equitable grounds on page 57 of the Record, asks the pertinent question, "Does the plea set up any defence; and if so is it available to the defendant under the general issue or plea of "not guilty" in an action of ejectment?" And on page 60 of the Record the said Supreme court answers said questions, and holds that all the available defense sought to be set up by said equitable plea, could be relied upon as a legal defense under the general issue, if the defendant was in a position to attack the patent. (See Record page 60.)

We invite the consideration of this court to the first grounds in the assignment of error.

In our discussion of these first five grounds of errors assigned by the plaintiff in error, we contend in behalf of the plaintiff in error, that the grounds set up in said amended plea are good, both in law and in the equity, as defense to the said action of ejectment. (These five grounds in the assignment of errors are found on page 67 and page 68 of Record.)

The plaintiff in error, as defendant in the court below,

sought to impeach the said patent and the plaintiff's right of possession by alleging and proving that the land in question was entered with "Valentine scrip," in violation of the Act of Congress of April 5th, 1872. That the facts alleged in said plea show that said patent was illegal and void and that plaintiff had no title or right of possession in and to said lands and also that the plaintiff in error, as defendant in the State trial court had an inchoate equitable right to the land in question under the Acts of Congress in such cases made and provided. The Act of Congress of April 5th, 1872, chapter 89, of the 42nd. Congress 17 Stat, provides for the issuance of "Valentine" scrip, and limits its location to "unoccupied and unappropriated" public land of the United States, and confines its location to tracts of not less than the subdivisions provided for in the United States land laws.

The plea sets up that the patent of the plaintiff's grantor was predicated upon an entry with "Valentine" scrip, which was located upon the land in question; that said land was at the time of the location of said scrip upon it and of the issuance of the patent, situated in the Fort Brooke Military Reservation of the United States at Tampa, Florida, and that said land was then within the jurisdiction of the war department, and not within the jurisdiction of the land department of the United States, and that said land was not then "unoccupied" public land of the United States, but was then "occupied" by the defendant, who had settled upon it in good faith, and was residing upon it as his home, cultivating and improving it with the intention of entering it under the land laws of the United States, &c.

If these facts be true and available to the defendant in said action of ejectment, the said patent was illegal and void, and the State trial court, and the Supreme court of Florida erred in denying to the plaintiff in error the privilege and protection invoked by said plea under the Acts or Congress of April 5th, 1872, and July 5th. 1884.

If the land in question was "occupied" or was within the jurisdiction of the war department, the officer who issued the patent had no authority to do so, and the patent is void both at law and in equity. This doctrine is sustained by numerous decisions of this court. See Polk's Lessee vs. Wendal 9th, Cranch 87. The case of Patterson vs. Winn, 11th, Wheaton 380, is also in point. There, this court held as follows: "We may therefore assume as settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by Statute &c., it may be impeached collaterally in a court of

law, in an action of ejectment." See 11th, Wheaton 380. If a patent be obtained fraudulently or against law, it does not carry the legal title. See Stoddard vs. Chambers 2nd, How. 285. And if issued for land reserved from sale by law, it is void for want of authority.

The decision of the court on this subject are too numerous to be enumerated. We refer to some of them.

See, Polk's Lessee vs. Wendel, 9th, Cranch, 87; New Orleans vs. U. S. 10th, Pet. 730; Wilcox vs. Jackson 13th, Pet. 509; Stoddard vs. Chambers 2d, How. 317-318; Easton vs. Salisbury 21st, How. 428; Reichart vs. Felps, 6th, Wall. 160; Best vs. Polk, 18 Wall. 117; Railroad Co. vs. U. S. 92 U. S. 733. Newhall vs. Sanger, 92 U. S. 761; Sherman vs. Buick, 93 U. S. 209; Smelting Co. vs. Kemp, 104 U. S. 636; Steel vs. Smelting Co, 106 U. S. 447(1st, Supreme court reporter 389); Railway Co. vs. Dunmeyer, 113 U. S. 642, (5 Supreme court reporter 566); Reynolds vs. Mining Co. 116, U. S. 689, (6 Supreme court reporter 601); Moor vs. Robins, 6 Otto. 533; U. S. vs. Stone, 2 Wall. 535; Minter vs. Crommelin, 18 How. 87, and Doolan vs. Carr, 125 U. S. 618, (8 Supreme court reporter 1228.)

The rule is clearly established by the above authorities that a patent for land issued by the land department without authority of law, or that a patent for lands over which the land department has no jurisdiction, is absolutely void. And this court said in Doolan vs Carr above cited, "that even a patent from the government of the United States, issued with all the forms of law, may be shown by extrinsic evidence to be void, if it be such evidence as by its nature is capable of showing a want of authority for its issue".

With this criterion before us, we again revert to the allegations in said amended equitable plea, "that at the time of the location of said "Valentine" scrip and of the issuance of the patent, said lands was "Occupied" and was also at that time "not within the jurisdiction of the land department" but was within the jurisdiction of the war department."

These facts, which constitute the want of authority in the land department to issue said patent, and which would show that the said patents to the plaintiff's grantor was void, says this court in Doolan vs Carr 125 U. S. 618, may be shown by "extrinsic evidence," if it be such evidence as by its nature is capable of showing a want of authority in the land department to issue the patent.

We claim in behalf of the plaintiff in error, that in the light of the above authorities, the assignments of error on page 67 and 68 of the Record are well taken as to the invalidity of a

patent issued without authority of law or issued upon land not within the jurisdiction of the land department.

The Supreme court of Florida does not controvert that such a patent would be void. (See page 59 and 60 of the Record.

We contend that if the patent through which the plaintiff in ejectment claimed title was void, it is fatal to his recovery in an action of ejectment. For in ejectment the plaintiff must recover on the strength of his own title, and not upon the weakness of that of his adversary.

But the Supreme court of Florida, winds up with the conclusion that although the facts set up in the said amended equitable plea strike at the very heart of the patent, and show that it is absolutely void, yet held that the defendant in the State trial court "was a mere trespasser" and not in a situation to attack the patent and therefore sustained a demurrer to the said equitable plea, and sustained the ruling of the trial court in ruling out the evidence offered by the defendant to sustain said plea. and thereby denied to the defendant the protection invoked through said plea, of the Acts of Congress applicable to said case. See Record pages 60, 61, 62 and 63.

The correctness of the said opinion and ruling of the said Supreme court of Florida is involved in the 1st, 2nd, 3rd, 4th and 5th, grounds of the assignment of errors. See Record pages 67 and 68.

The Supreme court of Florida, in its opinion on page 62 of the Record, holds that the plaintiff in error, the defendant in the State trial court, "at most was an occupier of lands of the United States without any right of entry and without any authority of law; and also holds that in this case, "there was no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by homestead entry, or that the defendant had acquired any right inchoate or otherwise, to enter the land." And, "that the defendant's claim is not shown to have been in privity with the Government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a 'mere trespasser' upon the land, and, as such" continues the Supreme court of Florida, "we do not think he can be heard to question the legality of the patent issued by the land office. See Record page 62.

We contend in behalf of the plaintiff in error, that no act is a trespass, but that which is unlawful, and that a bona fide settler upon the lands of the United States, who with the intent to enter the same under the public land laws of the Unit-

ed States, has taken actual possession of such land, cultivated and improved the same, and resided thereon with his family, and made it his home, acts in harmony with the benificent policy of the government, and is not a trespasser.

He is not only not a trespasser, but he is in privity with the government and that such possession and occupancy by a bona fide settler will enable him to protect his possessions in the courts, not as against the government, but against other individuals, and which the land officers are bound to respect (See Clements against Warner 24 How. 394-397. This court in Frisbie vs Whitney, 9th Wall. p. 187, says, "Occupancy and improvement on the public lands with a view to preemption, do not confer a vested right in the land so occupied."

It does confer a preference over others in the purchase of such land by the bona fide settler which will enable him to protect his possession against other individuals, and which the land officers are bound to respect."

This inchoate right may be protected by the courts against the claim of other persons who have not an equal or superior right, but it is not valid against the United States. (9th Wall 187).

There was no contest in this case between the plaintiff in error and the government.

But the plaintiff in error, as defendant in the State trial court of Florida, sought to establish, as a defense to said action of ejectment a superior claim to said land, as against the plaintiff in the said action, claiming, as against said plaintiff, that by reason of the facts set up in said equitable plea, the patent through which the plaintiff claimed title was void, and that under the policy of the government, and the acts of Congress in such cases made and provided, he had an inchoate right to the land in question, which, in equity and good conscience, under the direction and decree of the courts, ought to ripen into a perfect title to the said land. Here, then, is the issue presented to this court. The Supreme court of Florida says in its opinion that even if the patent to the plaintiff's grantor was void by reason of the facts set up in said equitable plea, the defendant in the State trial court could not attack it, because "said defendant bases his right to the land on settlement and occupancy under the act of Congress of July 5th, 1884, and his right to make a homestead entry, and it will be observed that the rights given to settlers in the first proviso of the act is coupled with the further proviso, that the land was subject to entry under the public land laws at the time of its withdrawal," and, that "There was no showing made, or offered to be made, that the Fort Brooke

reservation at Tampa was ever subject to entry under any of the public land laws when it was withdrawn for a reservation." See pp. 60 & 62 of the Record."

And hence the Supreme court of Florida concludes, that because the defendant in the trial court did not prove, or offer evidence to prove that the Fort Brooke reservation at Tampa, Florida, under the 2nd proviso, of the Act of Congress of July 5th, 1884. was subject to entry under any of the public land laws when it was withdrawn for a reservation, the defendant could acquire no right by virtue of said Act of Congress of July 5th, 1884, and "at most, he was an occupier of lands of the United States without any right of entry and without any authority of law," "and that the defendant's claim is not shown to have been in privity with the government's title, there being no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by 'homestead' entry, or that the defendant had acquired any right, inchoate or otherwise, to enter the land." See Record page 62. And for the reason above expressed, the Supreme court of Florida adjudged that the plaintiff in error, as defendant in the State trial court, was "a mere trespasser" upon the land," and could not be heard to question the legality of the patent issued by the land office." See Record page 62.

It is our task in behalf of the plaintiff in error to satisfy this court that the above opinion and ruling of the Supreme court of Florida is erroneous.

In our argument of this branch of the case, we respectfully refer this court to the amended equitable plea, set out on page 55 of the Record.

The Supreme court of Florida, while it admits the sufficiency of the grounds set up in said plea, bases its adverse decision to the plaintiff in error solely upon its construction of the Act of Congress of July 5th, 1884, that there being no distinct allegation in the plea that the land was subject to entry under the public land laws at the time of its withdrawal as required by the 2nd, proviso, of the said Act of Congress of July 5th, 1884, (See Record page 60); and no showing made or offered to be made by the defendant in the State trial court that the Fort Brooke reservation at Tampa was ever subject to entry under any of the public land laws when it was withdrawn for a reservation. See page 62 of the Record, and that therefore the defendant had no inchoate or other right to said land by virtue of the facts set up in said plea," "and was a mere trespasser, and could not be heard to impeach the patent."

This brings us to a consideration of the Act of Congress of July 5th, 1884 (23 Stat. 103.).

This is an act to provide for the disposal of abandoned and useless Military reservations, and repealed all other acts on the subject.

There is a saving clause in said act for settlers contained in the first proviso of the 2nd section of said act, which is as follows; "Provided, that any settler who was in actual occupation of any portion of any such reservation, prior to the location of such reservation, or settled thereon prior to January 1st, 1884, in good faith for the purpose of securing a home and entering the same under the general land laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding 160 acres in a body, according to the government surveys and subdivisions. Provided, further, That said lands were subject to entry under the public land laws at the time of their withdrawal." See Act of Congress of July 5th, 1884 (23 Stat. 103).

The plaintiff in error, as defendant in said State trial court, pleaded such facts as entitle him to the protection of the first proviso in the second section of said Act of Congress. But the Supreme court of Florida denied to the plaintiff in error every defence sought to be interposed in said suit on the grounds "that there is no distinct allegation (in said plea) that the land was subject to entry under the public land laws at the time of its withdrawal and no proof of the same. We submit that the plea did allege that the defendant was entitled to enter said land under the terms and conditions of the said Act of Congress of July 5th, 1884, which was equivalent to an allegation that the land was such land as was contemplated by the Act, viz, that it was subject to entry under the land laws at the time of its withdrawal.

That there was no showing made, or offered to be made, that the Fort Brooke reservation at Tampa, was ever subject to entry under the public land laws, when it was withdrawn for a reservation, is, we submit, not a provable fact, but a question involving the legal status of said reservation at the time of its withdrawal (from the public domain) or the creation of said reservation.

We respectfully submit that the Fort Brooke Military reservation of Florida was created by the proclamation of the President on the 10th day of December, 1830.

The power of the President to withdraw land from the public domain, or to create a reservation by executive order, is

not an open question. See Grisar vs. McDowell, 6 Wall. 381.

The lands embraced in the Fort Brooke reservation at Tampa were "withdrawn" or reserved by executive order of the President on the 10th day of December, 1830. The question then arises, what was the legal status of the land at and before that time? Was it then subject to entry under the public land laws of the United States?

The land was in Florida and within the public domain of the United States, ceded to the United States, by virtue of the Treaty of 1819, between the United States and Spain. It became subject to entry under the public land laws of the United States by the Act of Congress approved April 22, 1826 (4th Stat. 154-155).

This court will observe that this Act of Congress of April 22, 1826, by its terms is specially and solely applicable to the territory of Florida and subjected the whole of Florida, excepting land reserved for school to entry. So that by the said Act of Congress of 1826, the land embraced in the Fort Brooke Military reservation at Tampa, Florida, was subject to entry under the public land laws, at the time of the executive order creating said reservation, to wit, on the 10th day of December, 1830, when it was "withdrawn".

Therefore, the conclusion is inevitable that the Supreme court of Florida erred in its ruling, on page 62 of the Record, holding that "There was no showing made, or offered to be made, that the Fort Brooke reservation, at Tampa, was ever subject to entry under any of the public land laws when it was "withdrawn for a reservation," and that "The defendant's claim is not shown to have been in privity with the government's title, in any way," "and his adverse holding, under the showing made places him in the attitude of a mere trespasser "upon the land," and as such, he could not be heard to question the legality of the patent," and in holding that "there was no showing that the defendant had acquired any right, 'inchoate' or otherwise, to enter the land."

Upon this fallacious structure, built upon an absolute disregard of the Act of Congress of the 22nd of April, 1826, as applied to the Act of Congress of July 5th, 1884, the Supreme court of Florida upholds and sustains the trial court in its violation of the plain principles of law applicable to the case, and sweeps away from the defendant in the trial court the protection which he sought under the laws of the United States. See page 63 of the Record.

This same position assumed by the Supreme court of Florida, that a defendant in the court below could not attack the patent, or could not in defence of his possession show a de-

fect in the plaintiff's title, on the ground that the defendant had shown no right whatever, but were in possession as "naked trespassers" was taken by the trial court in the case of Reynolds vs. Mining Co., 116 U. S. 687. But this court held that this ruling was erroneous, and, "that, as in all other actions of ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's." See also Doolan vs. Carr, 125 U. S. 618, and authorities cited; Knight vs. U. S. Land Association 142 U. S. 161; Foss vs. Hinkell, 78 Cal. 158.

Under the plea in this case the plaintiff in error was a bona fide settler upon the land in question, had settled upon it in good faith with the honest purpose of entering it under the general land laws, was in possession and occupancy of it as his home when the plaintiff's grantor entered it with Valentine Scrip, contrary to the Act of Congress which created such scrip.

We claim in behalf of the plaintiff in error that his settlement upon the land in question was never hostile or adverse to the government, but was in harmony with the beneficent policy of the government towards the settler upon the public lands. We do not controvert the unquestioned right of the government to dispose of its lands under Congressional legislation. But we claim that having settled on the land by the permission and encouragement of the government we have a right in the courts to impeach a patent, illegally issued to the plaintiff's grantor while we were in the occupancy of the land. It was held in Lichfield vs. The Register and Receiver 1st Woolworth's Circuit court reports 299, that "settlers upon the public lands, under preemption and homestead laws, have an inchoate right, which they should be permitted to perfect into a legal title."

The plaintiff in error actuated by the honest belief that the land was at the time of his settlement still segregated, as a part of the Fort Brooke reservation, settled upon it and made his home upon it, under the honest belief that it was no longer of any use as such reservation to the government, and would soon be released to the Land Department, and with the honest intention of entering it under the general land laws, claims the protection of the principle enunciated by Mr. Justice Brewer in delivering the opinion of this court in Lake Superior Ship Canal, Railway & Iron Co. vs. Cunningham, 15 Supreme Court Reporter page 115. In this anticipation he was not mistaken. For the Act of July 5th, 1884, (23. Statute page 103) which followed his settlement, corroberated his anticipation, and adhering to the long established

policy of the government, made provision for the protection of such settlers. 23 Stat. 103.

Our case is not distinguishable in principle from the above cited (Lake Superior Ship Canal, Railway & Iron Co. vs. Cunningham 15 Supreme Court Reporter 115) in which Mr. Justice Brewer, speaking for this court. said. "But legislation respecting public lands is to be construed favorably to the actual settler." "If a party entering upon a tract, although he knew that it was within the limit of an old railroad grant, did so under the honest belief and expectation that that grant, if not technically extinguished by lapse of time, had remained so long unappropriated by any beneficiary, that Congress would shortly resume it, and in that belief determined to make for himself a home thereon, with a view of perfecting his title under the land laws of the United States when the forfeiture should be finally declared, it must be held, we think, that he is, within the terms of this conformatory act a bona fide claimant of a homestead," 15 Supreme court reporter 115, and approved in R. R. Co. vs. Osborn 160 U. S. p. 103 (16 Sup. court reporter 219).

Our case is identical in principle with the above opinion of this court and if we have met all the requirements of the said Acts of Congress of July 5th, 1884, we are in privity with the government and entitled to be permitted to perfect our inchoate title into a perfect legal title.

We have set up no claim to vested rights against the government. But we do claim that by virtue of our prior bona fide settlement, occupancy, inhabitancy, and improvement of the land in question. as against one whose subsequent entry and patent granted to the plaintiff's grantor in the violation of law, we are under the protection of the laws of Congress, whose benign policy towards the settler has been frequently declared by this court. See Shepley vs. Cowan, 91 U. S. 330-338; Frisbie vs. Whitney, 9 Wallace 187, and the "Yosemite" Valley cases 15, Wall. 78. In the latter case, this court (15 Wall. page 78 & 87), construing the preemption laws as to the rights of a settler, says, "The United States by the preemption laws do not enter into any contract with the settler or incur any obligation that the land occupied by him shall ever be put up for sale." "They simply declare by those laws that in case any of their lands are thrown open for sale, the privilege to purchase them in limited quantities, at fixed prices, shall be first given to the parties who have settled upon and improved them," and also Buxton vs. Travers 103 U. S. 235 (9 Sup. court reporter 509).

In the case of Shepley vs. Cowan, 91 U. S. 330-338, this

court said: "But while according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property." See also 18 Wall, 313, 314 and 315 Supreme court Report pp. 408 and 785.

This case, under the facts set out in the equitable plea is similar as to the right of the settler, to the case of the United States vs. Mo., K. and T. Railway Co.; 141 U. S. 358 (12 Supreme court Reporter 13). In the case just cited, Mr. Justice Harland, speaking for this court, after alluding to the allegation of the settlement and improvement similar in principle to the allegations of the plea in this case says, "If the facts are as thus alleged, it is clear that the Missouri Kansas company holds patents to land both within the place and indemnity limits of the Leavenworth road which equitably belong to bona fide settlers, who acquired rights under the homestead and preemption laws, which were not lost by reason of the land department having, by mistake or an erroneous interpretation of the statutes in question, caused patents to be issued to the company." See 141 U. S. 358 et seq."

The plaintiff in error as defendant set up in his said equitable plea, that at the time of the entry of the land by the plaintiff's grantor with Valentine scrip and of the issuance of the patent the said defendant was in the actual occupancy of said land. If this was true, then the land department by mistake or erroneous interpretation of the Act of Congress of April 5th, 1872 (17 Stat.) which prohibited the location of Valentine scrip on occupied land) violated said Act of Congress in issuing a patent upon such location to the plaintiff's grantor, and such patent, being issued without authority of law, was void, void for want of authority, and this, without any allegation or proof of the bona fides of such occupancy is a good defense of itself in ejectment. See Act of Congress of April 5th, 1872 (17 Stat).

The defendant in error claimed title through an entry of the land with Valentine scrip through a patent issued to his grantor under the Congressional grant to said Valentine of April 5th, 1872. "Occupied" land was excepted from entry with Valentine scrip under this Act of April 5th, 1872. See Atherton vs. Fowler 96 U. S. (6 Otto) pp. 519-520. The plaintiff in the State trial court claimed title through a patent issued to his grantor under this Act of Congress. The defendant in the trial court, as one of the grounds of defense,

claimed that at the time of such entry of said land with Valentine scrip, and of the issuance of the patent, it was not "unoccupied," but was then in the actual occupancy of the defendant. The defendant sought to prove and did prove in said trial that at that time he was in actual occupancy of said land. See Record page 28, 29 and 32. In Railroad Company vs. Smith, 9 Wall. page 99, this court says; "Now, when a party claiming under that grant sued to recover a particular piece of land which is excepted out of the grant by appropriate language, is it not competent to show by parol proof that it was of the class (covered by the first grant and excepted from the second), namely, so swampy, overflowed and wet as that the major part of the tract was unfit for cultivation?" Says this court (9 Wall. page 100). "The matter to be shown is one of observation and examination," viz: "was the land swampy, overflowed and wet, and unfit for cultivation?" In our case, the question is, was the land "unoccupied?" This, says this court in the above cited case, is a matter to be shown by parol proof. If it was occupied it was excepted from entry under the Act of Congress of April 5th, 1872, with Valentine scrip, and the patent was void, void because issued in violation of the Act of Congress of April 5th, 1872, (17 Stat.).

This of itself was a good and sufficient defense to this suit in the State court. See Samson vs. Smiley, 13 Wall. 91 and 92; and Doolan vs. Carr, 125 U. S. 618 et Seq. (8 Supreme court Reporter 1234). This defense, which the plaintiff in error interposed in the State trial court was entirely ignored, and the protection and privilege claimed by him under the Act of Congress of April 5th, 1872, was denied by the Supreme court of Florida. See Record pages 59 and 61. This brings us to the consideration of the sixth error assigned (See pages 68 and 69 of the Record). This involves the correctness of the charges given to the jury by the State trial court at the instance of the plaintiff in said action of ejectment. See Record pages 36 and 37. These were most remarkable charges. Taken together, these charges tell the jury that in an action of ejectment, where the plaintiff relies upon a patent of the government, there can be no defense by the defendant except to produce in evidence a legal title older than the patent of the plaintiff, or in other words, that a patent could not be impeached in such an action by showing that it was illegally or fraudulently issued in the land department, or that the land department had no jurisdiction to issue the patent. These charges clearly ignore the uniform and numerous decisions of this court from the time of Polks Lessee vs. Wen-

dal down to the present time. And in giving such charges, said trial judge had no respect for the fundamental principles of law applicable to actions of ejectment, and absolutely disregarded the Acts of Congress of April 5th, 1872, (17 Stat.) and of July 5th, 1884, under which the defendant sought to defend said action of ejectment.

The 7th and 8th errors assigned involved the correctness of the ruling of the trial court in refusing to give to the jury the charges asked for by the plaintiff in error as defendant in said trial court. See pages 69 and 70 and also pages 37 and 38 of the Record.

We beg to make the same comment upon the refusal of the trial judge to give these charges, as we have made upon his giving the above charges for the plaintiff.

The 9th error assigned is as follows. "That the Supreme court of Florida erred in affirming the judgment of the State trial court because said trial court excluded such evidence as tended to prove said equitable and said amended equitable plea." See page 70 of the Record.

These pleas are found on pages 3, 5 and 6 of the Record, and the substance of the defense set up in said pleas is contained in the opinion of the Supreme court of Florida on pages 55 and 56 of the Record.

The Supreme court of Florida on pages 61 et seq. of the Record discussed such evidence as was offered by the defendant in the trial court as tended to prove said equitable pleas. And on pages 61 and 63 of the Record the said Supreme court of Florida justified the trial court in refusing to admit such evidence, because, as it said, "The defendant not being in a situation to call in question the patent issued to the plaintiff's grantor, the (trial) court did not err in excluding the evidence offered for such purpose."

One of the purposes of the defendant in offering the documentory evidence alluded to on page 61 of the Record was to show that the land in 1877 was, by the proper executive order, reserved, or "withdrawn," and that it remained "withdrawn," or segregated until the patent was issued to the plaintiff's grantor in the year 1882, and that it was never released to the land department until the passage of the Act of Congress of July 5th, 1884.

Another purpose was to show that the land was "withdrawn," in the year 1877. And this for the purpose of meeting the requirement of the 2nd, proviso of the Act of Congress of July 5th, 1884, viz.: "Provided further, That said lands were subject to entry under the public land laws at the time of their "withdrawal." This evidence will be found on

page 19 et seq. of the Record. By the exclusion of this evidence it will be seen that the plaintiff in error was prevented from showing the very fact, the absence of which was sufficient, in the opinion of the Supreme court of Florida, to justify a denial of any defense offered by the defendant in the trial court.

The reasoning of that court is, that the defendant could not impeach the patent because he was not in privity with the government, and was a mere trespasser "upon the land," because he claimed, under the Act of Congress of July 5th, 1884, and had not shown, as required by that Act, that the land was subject to entry under the public land laws at the time of its "withdrawn" for a reservation.

Thus, it will be seen, that we were not allowed to show this fact, and were condemned because, says the Supreme court of Florida, we did not show it. See pages 62 and 63 of the Record.

We claim that a new reservation of "Fort Brooke" was created, or that the land was "withdrawn," by executive order, in 1877, and that at that time it was subject to entry under the public land laws, viz: the homestead and preemption laws which were then in full force. See Act of Congress of June 21, 1866, Chap. 127. Sec. I, or see Rev. Stats. of the U. S. Sec. 2303, so that whether, under a proper construction of the Act of Congress of July 5th, 1884, if the Fort Brooke reservation was "withdrawn" by executive order of Dec. 10, 1830, it was then subject to entry under the public land laws, to-wit: The Act of Congress of April 22, 1826, (4 Stat. pages 154 and 155) or the homestead laws. And if it was withdrawn in 1877 it was then subject to entry under the public land laws, to-wit, the homestead and preemption laws, which were then in full force. See Rev. Stats., Sec. 2303. Therefore the plaintiff in error claimed that he had an inchoate right to the land in question, under the Act of Congress of July 5th, 1884, was denied the right to make any defense to said action of ejectment by the Supreme court of Florida, upon the untenable assumption of that court "that the land was not subject to entry under the public land laws at the time of their "withdrawal." See Record page 62.

The 10th, and last ground specified in the assignment of errors involves a consideration of the refusal of the State trial court to grant a new trial on the grounds set out in the motion for a new trial, See Record pages 40 and 41.

We will only invite this court to a consideration of the fourth ground of the motion for a new trial, inasmuch as all the other grounds are embraced in our argument upon the

other points in the assignment of errors.

The said fourth ground of the motion is as follows: "Because the court erred in admitting in evidence the patent to Louis J. Brush, it appearing upon the face of said patent that it was obtained with, and predicated upon Valentine scrip, and that said land is a part of Fort Brooke Military reservation at Tampa, Florida." The patent is set out in totidem verbis" on pages 14 and 15 of the Record.

It appears upon the face of the said patent itself that it was predicated upon scrip located under the Act of Congress of April 5th, 1872, entitled an Act for the Relief of Thomas B. Valentine. Referring to said Act of April 5th, 1872, in third section thereof, it will be seen that it limits the location of Valentine scrip upon the "unoccupied," and "unappropriated" public lands of the United States, "not mineral," and in tracts not less than the subdivisions provided for in the United States land laws, and, if surveyed, when taken, to conform, when surveyed, to the general system of United States land surveys.

For the reasons assigned in our objection to the admission of the patent in evidence. See Record pages 15 and 16.

It is apparent upon the face of the patent that it was predicated upon the Valentine scrip, and issued under the Act of Congress of April 5th, 1872 (17 Stat.). We claim also that it appears from the face of the patent from the description of the land therein that said land was situated in the Fort Brooke reservation.

The land, as described in the patent, is described as "lot number eight, of section nineteen in township twenty-nine, south range nineteen east, and the lot number seven, of section twenty-four, in township twenty-nine south, of range eighteen east, of Tallahassee meridian, in district of lands subject to sale at Gainesville, Florida, containing forty acres and nineteen hundredths of an acre." See Record pages 14 and 15.

The records in the land department show that this land was withdrawn by executive order of the 22nd of January, 1877, and was not restored until the passage of the Act of Congress July 5th, 1884. See Record pages 22 et seq.

This land being reserved by executive order of the 22nd of January, 1877, (See Record page 22) the withdrawal of the 29th of May, 1878, did not restore it to the public domain by creating a new reservation of part of the same land embraced in executive order of January 22nd, 1877. When land is once withdrawn, it can only be restored in the manner prescribed by Congressional legislation. The Act of Congress

of August 18th, 1856, (11th Stat. 87) provided as follows. "That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be and are hereby placed under the control of the general land office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: Provided, That said lands shall not be placed under the control of said general land office until said opinion of the Secretary of War, giving his consent communicated to the Secretary of the Interior in writing shall be filed and recorded." See Act of Congress of August 18th, 1856 (11th Stat. page 87).

We submit that there was no legal restoration of the land embraced in the patent until the passage of the Act of Congress of July 5th, 1884. We are therefore driven to the conclusion that in 1882, when the patent issued to the plaintiff's grantor, the land was not within the jurisdiction of the land department, and that the patent was therefore void.

The Act of Congress of July 5th, 1884, provided for the disposition of useless and abandoned military reservations restored all of Fort Brooke reservation which had not prior to the passage of said Act been legally turned over, or released, by the War Department to the Land Department. The plaintiff in error claims the protection of the said Act of July 5th, 1884, and seeks in this court such a judgment as will perfect his inchoate equitable right into a perfect legal title. We claim the benefit of the principle announced by Mr. Justice Shiras in delivering the opinion of this court recently in the case of Hendrick vs Atchison, T. & S. F. R. Co., 17th Supreme court Reporter, p. 925. He there said: "The holder of a legal title in bad faith must always yield to a superior equity." The patent vested in him the legal title, but it did not determine the equitable relations between him and third persons. 17th Sup. court Rep. 925, and authorities cited.

As to what judgment or decree in favor of the plaintiff in error would be proper, under the circumstances of this case, we respectfully submit to the descretion of this court.

Respectfully submitted,

SAMUEL Y. FISLEY,

Attorney for the Plaintiff in Error.

No. 239.

Brief of Cooper & Cooper for Def'

Filed May 20, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 239.

JAMES JOHNSON, PLAINTIFF IN ERROR,

vs.

GEO. F. DREW, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

C. M. COOPER,
J. C. COOPER,
Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

No. 239.

James Johnson, Plaintiff in Error,
vs.
George F. Drew, Defendant in Error.

In Error to the Supreme Court of the State of Florida.

Statement.

This is a writ of error allowed by the Chief Justice of the Supreme Court of Florida, and which writ was issued by the Deputy Clerk of the Circuit Court of the United States for the *Southern District of Florida* (See pages 72 and 72 of Record), and is directed to the Judges of the Supreme Court of the State of Florida to bring up a certain cause determined in that Court on the 19th of July, 1894.

The writ should be dismissed.

This writ of error is issued by E. O. Locke, Clerk of the Circuit Court of the United States for the *Southern* District of Florida, by H. L. Crane, *Deputy Clerk.* (See page 72 of Record.) The Supreme Court of the State of Florida sits in the City of Tallahassee, State of Florida, as provided by the laws of said State.

See Section 1311 Rev. Stat. of Fla., as follows:

"The Supreme Court shall hold two terms in each year, in the Supreme Court room in the capitol, commencing respectively on the second Tuesday in January and June. The Court may adjourn from time to time, as may be deemed necessary for the dispatch of business."

The capital of the State is the city of Tallahassee. The city of *Tallahassee* is in the County of Leon, and within the Northern District of Florida. The State of Florida is divided into two districts.

See Chap. *280*, U. S. Stat. Vol. 20, Rev. Stat. See 534 Chap. 149, 28 Stat. U. S., page 117 (1893-1894).

The Deputy Clerk of the United States Circuit Court for the Southern District of Florida, had no power or authority to issue this writ directed to the Judges of the Supreme Court of the State of Florida.

This writ of error should have been issued by the Clerk of the Supreme Court of the United States, or if the act of Congress applies, it should have been issued by the Clerk of the Circuit Court for the *Northern* District of Florida, within which the Supreme Court of the State of Florida sits and its records are kept, to-wit, in the City of Tallahassee, Florida, the Capital of the State.

The Deputy Clerk of the Circuit Court of the United States, to-wit, H. L. Crane, had no authority to issue a writ of error. The act of Congress in such cases only authorizes the *Clerks* of the Circuit Court to issue writs of error as the writs of the Supreme Court of the United States.

For the reasons stated, to-wit, that this writ of error was issued by the *Deputy Clerk*, and that such *Deputy*

Clerk was a Deputy Clerk of the United States Circuit Court for the *Southern* District of Florida, while the Supreme Court of the State of Florida and its records are located within the Northern District of Florida, we submit the writ of error in this cause should be quashed as not having been properly issued.

STATEMENT OF THE CASE.

This was an action of ejectment brought in the Circuit Court for the Sixth Judicial Circuit of the State of Florida, Hillsborough County, in which the defendant in error, George F. Drew sued James Johnson, plaintiff in error, in ejectment, to recover possession of a certain tracts of land, described in the complaint as lot eight of Section nineteen, Township 29 south, Range 19 east, and lot 7 of section 24 in Township 29 south, range 18 east. (See page 2 of the Record.)

The defendant, by his attorneys, filed two pleas; first, the plea of not guilty, and second, an alleged plea upon equitable grounds. (See page 3 of Record.)

The defendant in error, plaintiff below, demurred to the so-called equitable plea (See page 4 of the Record). This demurrer was sustained by the State Circuit Court (See page 8 of the Record).

The defendant sought to file a so-called amended plea upon equitable grounds (See pages 5 and 6 of Record). Leave to file this plea was denied, on the ground that it is not sufficient as a plea upon equitable grounds

(See page 7 of the Record). Two of the grounds of the demurrer on page 4 of the Record, to the original so-called plea on equitable grounds, were that the plea did not show any ground for the interposition of a court of equity in his behalf.

The cause was thereupon tried upon the defendant's plea of "not guilty." The plaintiff proved title to the land in controversy by introducing in evidence a patent from the United States to Louis J. Brush (Found on pages 14 and 15 of the Record), and by deed from Louis J. Brush and wife to the plaintiff (Found on pages 16 and 17 of Record).

The defendant offered in evidence what purported to be correspondence of officials in the War Department of the United States in reference to certain lands referred to in the correspondence as the Fort Brooke Reservation in Florida. The defendant nowhere proved that the land in question was any part of this Reservation. The defendant appears to have offered in evidence an alleged diagram showing the lands consequent upon the restoration to the public domain of a portion of the Fort Brooke Military Reservation, but the alleged diagram was not certified under the seal of any office, nor the signature of the official who purported to certify to same proven, and the same was not allowed to be introduced in evidence (See pages 24 and 25 of the Record).

The defendant then sought to show by certain witnesses, including the plaintiff (whose testimony is found on pages 25 to 33 of the Record), that the defendant had been living on the lot in question before the patent from the United States to plaintiff issued. The defendant did not show any claim of right or title under which he went into or held such possession. The only testimony attempting to prove any effort of the defendant to claim

under any law of the United States is that of the witness Chamberlain (found on page 26 of the Record), which is simply a vague, indefinite statement that at some time, which is not identified, the defendant made some sort of effort to secure an application for the land. What the effort was is nowhere stated in the testimony.

All of this evidence as to alleged possession anterior to the date of the patent properly was ruled out on the ground that the questions addressed to the witness called for their opinions as to the nature of the plaintiff's claim of possession, and as to the alleged attempt at a settlement upon the land made by the defendant, and because defendant had not shown, or offered to show, that he was upon the land under any specific claim of title, and because the defendant had not shown by any legal proof any effort to enter the land or acquire title to the land under any law of the United States, or settle upon the same for the purpose of obtaining any homestead, or other right under the laws of the United States upon this land.

The testimony elicited was purely of a bare possession of a part of the land by the defendant, when the title to same was in the United States, and down to the issue of the patent to plaintiff's grantor Brush, on the 30th of September, 1882. Judgment was entered in the Court below for the plaintiff. The defendant below as the plaintiff in error in this Court, took a writ of error to the State Supreme Court of Florida. The Supreme Court of Florida, on the 19th of July, 1894, affirmed the judgment of the Court below and rendered its opinion in the cause (found on pages 54 and 55 of the Record). From this writ of error the defendant below, who is plai
error here, obtained the alleged writ of error in thi
and brought the Record here.

There is no Federal question involved in this case.

An examination of the questions arising on the trial in the State Circuit Court, and passed upon by the Supreme Court of the State of Florida, will show that there is no question necessarily presented in the Record on account of which, under the Acts of Congress, this Court is required to review the decision of the Supreme Court of the State of Florida.

This writ of error is attempted to be prosecuted here by virtue of section 709 of the U. S. Rev. Stat. Under the act of Congress referred to it should distinctly appear that the plaintiff in error had some definite, distinct title or right under the Constitution or Statutes of the United States, and the decision of the Supreme Court of Florida must distinctly appear to have been against the said title or right of the plaintiff in error, and that such title depended upon the statute of the United States referred to.

It should also appear that this right, title or privilege claimed by the plaintiff in error under such statute of the United States was distinctly set up by him in the State Courts, and that the decision was adverse to it in the State Courts.

New Orleans Waterworks Co. vs. La. Sugar Ref. Co., 125 U. S., 18.

De Saussure vs. Gaillard, 127 U. S., 216.

Hale vs. Akers, 132 U. S., 554.

San Francisco vs. Itsell, 133 U. S., 65.

Missouri vs. Andriano, 138 U. S., 497.

Ryan vs. Thomas, 4 Wallace, 603.

The claim under the statutes of the United States must have been distinctly raised in the Court below.

Hoyt vs. Sheldon, 1 Black, 518.

R. R. Co. vs. Rock, 4 Wall., 177.

Spies vs. Illinois, 123 U. S., 131.

French vs. Hopkins, 124 U. S., 524.

No claim or right by the defendant below under the Constitution or laws of the United States.

It will be seen by a careful examination of the testimony offered by the defendant below that he did not anywhere show that he claimed a right of homestead entry, or any other right in the land in question under any law of the United States.

The Supreme Court of the State of Florida, in its opinion (see page 61 of Record) states that "There was no effort to show that the defendant had ever obtained any certificate of entry of the land from the land office, or that he had any deed or paper evidence of title of any kind to the land from any source whatever."

Further (on page 62 of the Record), the Supreme Court of the State of Florida states: "In the case before us there was no showing that the land occupied by the defendant was ever subject to entry under any of the public land laws by homestead entry, or that the defendant had acquired any right inchoate, or otherwise, to enter the land. Defendant's claim is not shown to have been in privity with the Government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a mere trespasser upon the land."

The evidence offered by the defendant in the Court below, as found in the Record, sustains this finding of the Supreme Court of the State of Florida. The defendant only proved that he was upon the land.

No matter what the alleged objection made by the defendant to the patent from the United States to Brush, the grantor of the defendant in error, no question is presented for the decision of this Court, unless the plaintiff in error established in the trial below some right or claim *in himself*, distinctly set up and proven under the laws of the United States, and that the decision of the Supreme Court was against such right or claim. The defendant below, plaintiff in error here, has entirely failed in this record to distinctly point out or set up in the court below, or in the State Supreme Court on the record any definite right or claim that he might have to the land in question under the laws of the United States, and upon which the Supreme Court of Florida has rendered a decision against the said plaintiff in error. Therefore, we submit this Honorable Court should affirm the judgment of the Supreme Court of the State of Florida on this record, as presenting no question for the review of this Court.

The decision of the Supreme Court of the State of Florida does not necessarily depend on the determination of any Federal question.

The Supreme Court of Florida, in its opinion reviews the action of the Court below in sustaining the demurrer to the so-called equitable plea and in refusing to defendant below the right to file an alleged amended equitable plea.

Under the statutes of the State of Florida, in common law actions, a defendant who has some defense which would be good ground for maintaining a bill in equity to enjoin a judgment, already obtained, may set it up by way of what is termed an equitable plea.

The language of the statute of the State of Florida, section 1047, Rev. Stat. of Fla. is as follows: "The defendant in any cause in any of the courts of this State in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, may plead by plea or subsequent pleadings the facts which entitle him to such relief by way of defense."

An examination of the alleged equitable plea (found on page 3 of the record) and of the amended equitable plea (pages 5 and 6 of the record) will show that the matter therein contained was in no sense ground for equitable relief or proper matter to be pleaded as an equitable plea under the statutes of Florida. The substance of the matters contained in these pleas were that the United States had no authority to issue the patent to plaintiff, for reasons stated in the alleged equitable plea, and that the plaintiff was in possession of the land prior to 1877 and at the time of the passage and approval of an act of Congress approved July 5th, 1884, and that he claimed under that law to be entitled to make homestead entry of the land in question.

None of these matters were admissible under an equitable plea. If the plaintiff had shown himself by the evidence to be in position to attack the patent of the United States in an action at law, he could have done so under the plea of "not guilty." The decision, therefore, of the Supreme Court of Florida as to these pleas does not necessarily involve any Federal question, and does

uot necessarily depend upon the determination of any claim of the defendant below under any law of the United States.

Even if it appeared that the decision of the Supreme Court of Florida was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, to-wit as to the nature of defense under an equitable plea, this Court will affirm the judgment.

The Supreme Court of Florida held (See page 57 of the record) that the facts alleged in the plea must not make such a defense as is available to the defendant in common law action, as the Court in such case will be justified in refusing to allow the plea to be filed, or in striking it out, if filed, citing,

Dickinson vs. Gamble, 16 Fla., 687,

Spratt vs. Price, 18 Fla., 289,

Walls vs. Endell, 20 Fla., 86,

Johnston vs. Allen, 22 Fla., 224.

Again says the Court (on page 60 of the record) "Conceding that the defendant was in a position to attack the patent all the available defense sought to be set up by the equitable plea in our judgment, would in our judgment be relied upon as a legal defense under the general issue, and the Court did not err in refusing to allow such plea to be filed."

The decision of the Supreme Court of the State of Florida on the admissibility of evidence and on the charges of the Court do not necessarily decide against any claim of defendant below, plaintiff in error, under the laws of the United States. The substance of the decision is, that if the plaintiff in error had any claim under the

laws of the United States, he never showed, or attempted to show it, and therefore the evidence of possession, prior to the patent, was incompetent; and the evidence from the records of the War Department not having been connected with the land in question was incompetent.

The Supreme Court of Florida states, in its opinion, that there was no effort to show that defendant ever obtained any certificate of entry of the land from the Land Office, or that he had any deed or paper evidence of title of any kind to the land from any source. The Court further says (page 60 of the record), "There is doubt whether the documentary evidence offered by the defendant shows that the particular lots mentioned and described in the declaration were *in the Fort Brooke Reservation* when the patent was issued."

Reference to the record (page 24) will show that the alleged plat, offered to show that this land was within the reservation, was objected to on the ground that it was not properly certified, and there was no seal of office or proof of the signature of the officer purporting to certify to the plat; so that absolutely in this record there is no showing that the land in question was a part of the Fort Brooke Military Reservation, or that the defendant ever attempted, under the laws of the United States, to enter the land as homestead or to acquire title to same. There being this absence of proof, it is sufficient in order to sustain the opinion of the Supreme Court of the State of Florida, to hold that on questions of admitting or rejecting evidence, such evidence of possession of the defendant is not connected with any claim of title under the laws of the United States, or that the land is not shown to be a part of the Military Reservation. And further, as stated by the Supreme Court of the State of Florida, on page 62: "In the case before us there was no showing

that the land, occupied by the defendant, was subject to *entry under any of the public land laws for homestead entry*, or that the *defendant had acquired any right* inchoate or otherwise to enter the land. Defendant's claim is not shown to have been in privity with the Government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a trespasser upon the land." Under all these circumstances, we insist that the judgment of the Supreme Court of Florida should be affirmed on the ground that its judgment did not necessarily involve any Federal question, and that its opinion may be based upon other propositions, not involved in passing upon any law of the United States, or any right under any law of the United States.

The Plaintiff in Error cannot attack the patent from the United States under which the Defendant in Error claims title.

The defendant in error seeks, in argument, to assert that the patent from the United States to Brush, under which defendant in error claims title (pages 14 and 15 of record), was issued without authority of law. The grounds of his attack on this patent are in substance that the patent is based on the Valentine scrip, and that such scrip could not be located on this land, because it is alleged (but not proven), that same was a part of what is termed Fort Brooke Military Reservation, and that the entries did not conform to the surveys of the General Government, and further that the land was not unoccupied land but was occupied, meaning thereby the alleged occupation thereof by the plaintiff in error.

The plaintiff in error had no title of interest in, or possession of, the land, which the United States was bound to recognize in issuing a patent, and therefore the plaintiff in error is not in a position to attack the action of the United States in issuing such patent and cannot raise these questions. The Supreme Court of Florida, speaking of this part of the case, says (on page 62 of the Record) that "At most the plaintiff in error was an occupier of lands of the United States, without any right of entry, and without any authority of law." The Court further, in its opinion, states: "We have been unable to find any authorities to sanction the view that a mere trespasser upon public lands has the right to question the legality of a patent issued by the United States land officer," and cites thereto

Cooper vs. Roberts, 18 How. 173.

Doll vs. Meador, 16 Cal. 295.

The court also distinguishes the cases cited by the plaintiff in error, particularly Doolan vs. Carr, 125 U. S. 618, and Reynolds vs. Iron Silver Mining Co., 116 U. S. 687.

In the case of Doolan vs. Carr, 125 U. S. 618, the defendants had entered upon the land under a claim of pre-emption and settlement, and had made and subscribed a declaratory statement of intention to pre-empt the land and presented them to the Register of the local land office, but they were refused on the ground that the land had been patented to a railroad company.

In the case at bar it does not appear that the plaintiff in error ever filed any application to enter this land, or declaratory statement, or other paper in the land office of the United States, or took any action under the laws of the United States (which the Government was called

upon to recognize), looking to entering of this land, or to claim possession under any law of the United States. Therefore he cannot be heard to question the action of the United States Land Department in issuing the patent in question.

If the plaintiff in error showed anything by his proof offered of correspondence between the War Department and the General Land Office it would show that from the time plaintiff claims to have entered upon the land in July, 1871, down to January 4th, 1883, said plaintiff in error was a mere trespasser upon a Military Reservation, in which he could not possibly obtain homestead rights, or any right of entry.

Without some positive showing upon the record of plaintiff in error of having acquired some rights in the land, this Court will presume that the officers of the Interior Department acted within their authority in issuing the patent in question.

See authorities hereafter cited, on the point of collateral attacks upon a patent issued by the United States.

Attacks upon the patent under which defendant in error claims title.

If the Court shall reach the conclusion that the plaintiff in error may question the propriety and authority of the Interior Department in issuing this patent, we insist that none of the attacks attempted to be made upon the patent are well taken, and that none of them are sustained by the testimony contained in the record. There was no showing whatever that the lands in question were in fact within the Fort Brooke Military Reservation.

There was no competent evidence that the lands covered by the patent *had not been properly transferred by the War Department to the Interior Department before the patent in question issued.* The patent alone would afford *prima facie* evidence that the proper transfer had been made before the issuance of the patent. The correspondence offered in evidence would only show that some land, known as the Fort Brooke Military Reservation, was transferred on January 4th, 1885, by the Secretary of War to the General Land Office. There is no evidence in the record that the portion of Fort Brooke Military Reservation *included in this patent* was not, previously to June 4th, 1883, transferred to the Indian Department. If it was, and without evidence to the contrary, the issuing of the patent is *prima facie* evidence of such transfer, then the Interior Department had full power to allow the entry of the Valentine scrip upon said land and to issue a patent for same, under the provisions of the act of Congress of August 18th, 1856 (11. Stat. L., page 87).

This act provides for the sale and disposition of the lands reserved for military purposes in the State of Florida, and provides that they shall be sold and disposed of in the same manner and under the same regulations as other public lands of the United States, and further provides for the transfer of same from the War Department to the Department of Interior. Under the terms of this act, at the date of the patent in question, to-wit, on the 30th of September, 1882, the Interior Department had full power and authority to allow the entry of said land by Brush, and to issue patent to said Brush, if the lands had been transferred to the Interior Department. This Court will presume that they had been.

The further objection made to this patent is that the lands were not unoccupied, and in the motion for a new

trial of plaintiff in error, in the State Court, under the fifth ground (page 40 of the record), the plaintiff in error claims that the lands were not unoccupied, but were in the *occupancy of the defendant*, to-wit, of plaintiff in error. It will be seen from the testimony of the defendant below, that what he meant by occupied land was that he was in the occupancy of same, and therefore it could not be entered with Valentine scrip.

Unoccupied lands, within the meaning of the land laws of the United States, means lands that are not occupied by persons claiming under same *right or title recognized by the United States;* it does not refer to mere occupancy by a trespasser or by a person with no claim or right in the land. These lands, according to the showing of the plaintiff in error himself, were unoccupied lands, in the meaning of the law. The occupancy of the plaintiff in error, he having made no effort whatever at the land office to enter the land or taken any action recognized by the United States, did not constitute the lands occupied within the meaning of the law. The United States Land Office did not know, and were not called upon to know, that the defendant was on the land, or claimed any interest in it. They were authorized to allow the entry of Brush and to issue patent to Brush, as against the plaintiff in error, because he had no *status*, as to the land, justifying the officers in considering or recognizing him in the matter in any way whatever.

As to the question of surveys, or whether the land was made to conform to the surveys of the United States, all of these questions in reference to surveys belong exclusively to the Land Department and cannot be raised in collateral attack against the patent.

See Cragin vs. Powell, 128 U. S., 691.

Knight vs. U. S. L. Ass'n, 142 U. S., 161.

As to all of these questions attempted to be raised in argument by the plaintiff in error against the issuance of the patent, we insist that the principle that a patent of the United States is the highest evidence of title and cannot be attacked collaterally by a third party, should be strictly applied. This Court has so held in a number of cases. It was a question of fact in this case as to whether these lands were occupied or unoccupied, and it was a question of fact as to whether these lands had ever been included in the Fort Brooke Military Reservation, and whether or not they had been transferred by the War Department to the Interior Department. It was also a question of fact as to whether the lands were made to conform to the official surveys. The Land Department had jurisdiction to determine these facts, and the issuance of the patent was evidence that, if these lands were ever in the Fort Brooke Military Reservation, they had been transferred by the War Department to the Interior Department. As to the questions of survey and occupancy, the patent certainly cannot be attacked collaterally in any action of ejectment, on those matters.

See Steele vs. St. Louis S. & R. Co., 106 U. S. 447.

Sioux City L. Co. vs. Griffey, 143 U. S. 32.

St Louis, S. & E. Co. vs. Kemp, 103 U. S. 636.

Baldwin vs. Stark, 107 U. S. 463.

Knight vs. U. S. L. Assn., 142 U. S. 161.

Heath vs. Wallace, 138 U. S., 573.

Hardin vs. Jordan, 143 U. S., 371.

Lee vs. Johnson, 116 U. S., 48.

Johnson vs. Towsley, 13 Wall., 73, 83.

French vs. Fyan, et al., 93 U. S., 169.

Wright vs. Roseberry, 121 U. S., 488.

The land in question not shown to be subject to entry by plaintiff in error.

The plaintiff in error in argument seeks to claim some right or interest in the land under the provisions of the United States Statutes, to-wit, acts of 1884, chapter 214. *This was an act passed after the issuance of the patent in question* providing for the disposition of lands reserved for military purposes in the State of Florida. It contained a proviso, in reference to occupants who were upon the land in good faith for the purpose of entering the same under the general law, and provided further that the said lands were *subject to entry under the public land laws at the time of their withdrawal.* Chap. 214, Acts of 1884.

The Supreme Court of the State of Florida very properly determined, as to this branch of the case, that the pleas offered contain no allegation that the land was subject to *entry under the public land laws at the time of its withdrawal,* and further (on page 62 of the Record) that there was no showing made that the lands in question were ever subject to *entry under any of the public land laws when withdrawn for a Reservation.*

As we have stated above, the proof in the case is wholly defective in showing that the lands covered by the patent ever were in Fort Brooke Military Reservation, and wholly defective in showing by any competent proof,

when they were withdrawn, or when they were restored, if ever restored, except that the patent is *prima facie* evidence that if these lands ever were a part of the military reservation they were restored to the Land Department before the issue of the patent.

It was incumbent upon the plaintiff in error attacking this patent to show that the land in question was of a character that made it subject to entry at the time that they were *first withdrawn* and created a part of the Fort Brooke Military Reservation, in order to claim that the said Act of 1884, affected said lands. The copies of the correspondence offered in evidence by the plaintiff in error do not fix when the lands in question were first withdrawn and created a part of the Fort Brooke Military Reservation, or the status of the lands at that time. The correspondence referred to begins with a letter dated July 24th, 1860, from the then Secretary of War to the Secretary of Interior, simply stating that the Fort Brooke Military Reservation is then in readiness to be turned over to the Department of the Interior. The next document is a letter from the Secretary of War, dated April 6th, 1870, to the same effect. The next is a letter dated January 4th, 1883, from the Secretary of War to the Secretary of Interior, relinquishing and transferring certain lands at that time the Military Reservation of Fort Brooke, Florida. Whether or not these lands had before that time been transferred to the Interior Department under the act of 1856 is not shown, or what the status of the lands covered by the patent were at the date of the letter of February 4th, 1883.

Certain other correspondence on pages 22 and 23 of the Record and orders of the President, dated respectively January 22nd, 1877, and May 29th, 1879, apparently cut down the previous reservation at the post of Fort

Brooke, Tampa, Florida, and prescribe new boundaries of same. None of these orders and letters in terms are shown to cover the land in question, and if anything is shown by this proof it is that Fort Brooke Military Resvation had in fact existed for many years before, and that the lands in question were never subject to entry, and therefore that the Act of Congress of 1884 did not apply to them.

Certain it is that there was no showing by the defendant in the court below as to when the original reservation was created, or that at the time of creating the original reservation it included the land in question, or that if it did include the land in question *that said lands were subject to entry.*

Unless all these facts were proven as against the patent issued by the Government of the United States, the defendant did not show that he could acquire any right in this land under the said act of Congress of 1884.

All of the authorities referred to by the plaintiff in error in his brief are cases in which the entry-man had taken action in the Land Department himself to enter the land and are cases where it was shown that the land was subject to entry at the time he took such action, but the plaintiff in error did not bring himself within either of these conditions, and therefore the authorities cited by the plaintiff in error do not apply to the facts of the case at bar.

The defendant in error, the plaintiff below, was entitled to recover the land sued for on the patent and his deed from Brush, the grantee in the patent. The plaintiff in error, defendant below, did not show himself to have any right, title, or interest in the land, except a claim of bare possession, and therefore as against the pat-

ent he could not be permitted to continue to hold possession of the lands in controversy.

The Court below did not err in refusing to give the charges asked by the defendant. The Supreme Court of Florida in this case determined, on page 63 of the Record that, "There was no testimony before the jury to authorize the charges requested by the defendant and refused." This being true there is no Federal question for this Court to review on the charges asked by the defendant below and refused. If, however, this Court shall determine that it ought to examine the charges, we submit that they do not state the *law of this case*, and were properly refused. The same argument as to the evidence and pleas offered apply to the charges. The defendant did not bring himself within the provisions of the law stated in his charges. He was not a homesteader, or an entryman under the homestead laws of the United States at the time of the issuing of the patent. He did not show any of the facts as to the land in question that would make the act of Congress of 1884 apply to said lands. He did not show any facts to sustain his objections to the patent issued to Brush, the grantor of defendant in error.

For these reasons we insist that the judgment of the State Court in favor of the defendant in error, as plaintiff, and the judgment of the Supreme Court of the State of Florida affirming said judgment of the lower court, were correct and ought not to be disturbed or reversed by this Honorable Court.

C. M. Cooper
J. C. Cooper

Attorneys and Counsel for Defendant in Error.

JOHNSON *v.* DREW.

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ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 239. Submitted April 28, 1898. — Decided May 31, 1898.

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The substantial rights of the defendant were not prejudiced by the ruling of the trial court sustaining the demurrer to the first equitable plea and refusing leave to file the second, and such ruling involved merely a question of state practice.

The evidence in the case shows that the particular lots of land described in the declaration were not embraced in the Fort Brooke reservation when the patent was issued.

A party cannot defend against a patent duly issued for land which is at the time a part of the public domain, subject to administration by the

Statement of the Case.

land department, and to disposal in the ordinary way, upon the ground that he was in actual possession of the land at the time of the issue of the patent.

The act of Congress of July 5, 1884, c. 214, 23 Stat. 103, concerning the disposal of abandoned and useless military reservations, has no significance in this case, as the patent had issued and the title passed from the Government prior to its enactment.

In September, 1886, defendant in error commenced an action of ejectment in the Circuit Court of the State of Florida, for the county of Hillsborough, to recover possession of a tract of land described as follows:

"Lot eight (8) of section nineteen (19), township twenty-nine (29) south, of range nineteen (19) east, and lot seven (7) of section twenty-four (24), in township twenty-nine (29) south, of range eighteen (18) east, containing about forty and nineteen one-hundredths (40.19) acres."

The defendant, now plaintiff in error, filed a plea of not guilty and also a plea based on equitable grounds. A demurrer to this latter plea was sustained, and thereupon the defendant asked leave to file an amended equitable plea. This application was denied, the court holding that the grounds of defence set up therein were not sufficient. That plea alleged in substance that the plaintiff's title rested on a patent from the United States, issued on a location of Valentine scrip; that such scrip was, by the terms of the statute under which it was issued, to be located only upon unoccupied and unappropriated lands of the United States; that the land in controversy was, at the time of the location of the scrip, a part of Fort Brooke military reservation, and was also in the actual occupancy of the defendant. The case came on for trial in September, 1889, and the defendant offered evidence in support of all his defences, including therein the matters set up in the equitable plea which he had been refused leave to file. This testimony was held insufficient by the court, and the trial resulted in a verdict and judgment for the plaintiff, which judgment was thereafter, and in June, 1894, affirmed by the Supreme Court of the State; whereupon the defendant sued out this writ of error.

The Valentine Scrip Act was passed April 5, 1872, c. 89,

17 Stat. 649, and authorized the location of such scrip on "the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws." The patent to the plaintiff was issued September 30, 1882, and recited that it was upon a location of Valentine scrip, and in his equitable plea defendant averred that the patent was predicated upon an entry at the local land office of the United States at Gainesville, Florida. On August 18, 1856, Congress passed an act, c. 129, 11 Stat. 81, 87, containing this provision:

"That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be, and are hereby, placed under the control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: *Provided*, That said lands shall not be so placed under the control of said General Land Office until said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior in writing, shall be filed and recorded."

At that time there was in existence what was known as the Fort Brooke military reservation, near the town of Tampa, Florida. As appears from the testimony offered by the defendant, on July 24, 1860, the Secretary of War wrote to the Secretary of the Interior as follows:

"War Department, *July 24th*, 1860.

"Sir: Referring to the correspondence between the two departments on the subject, I have the honor to enclose to you a report of the Quartermaster General showing that Fort Brooke is now in readiness to be turned over to the Department of the Interior, in pursuance of the arrangements made to that effect.

"Very respectfully, your obedient servant,

"John B. Floyd, *Secretary of War.*"

"Hon. J. Thompson, Secretary of the Interior."

The enclosed report from the Quartermaster General stated that all the movable property of the Government had been sold, and that there was no reason why the military reservation should not be turned over to the Interior Department. Probably the exigencies of the war, which soon thereafter commenced, prevented any further action by either department, for on April 6, 1870, the following communication was sent by the Secretary of War to the Secretary of the Interior:

"WAR DEPARTMENT, WASHINGTON CITY, *April* 6, 1870.
"The honorable Secretary of the Interior.
"SIR: I have the honor to reply to a letter addressed to this department by the Commissioner of the General Land Office on the 26th ultimo relative to the public lands occupied by this department for military purposes at Fort Brooke, Florida, and to inform you that there is no longer any objection to their disposition by the General Land Office under the laws governing the subject.
"Very respectfully, your obedient servant,
"WM. W. BELKNAP, *Secretary of War.*"

From the date of this last communication up to 1877 the record discloses no action by either department, but in January, 1877, the Secretary of War requested that a military reservation at Fort Brooke be declared and set apart by the executive. Subsequently, and on May 29, 1878, the Secretary of War addressed a communication to the President as follows:

"WAR DEPARTMENT,
"WASHINGTON CITY, *May 29th*, 1878.
"To the President.
"SIR: In accordance with recommendation of commanding general department of the South, concurred in by division commanders, I have the honor to request that a military reservation at the post of Fort Brooke, Tampa, Florida, with boundaries as hereinafter described, may be duly declared and set apart by the executive in lieu of the lands at that post reserved by executive order dated January 22, 1877, to wit: Beginning at the intersection of the line which bounds the

town of Tampa on the south with the Hillsborough River, running thence along said line which bounds the town of Tampa on the south, and in prolongation thereof north 68 degrees 45 minutes east 2976 feet; thence north 4 degrees 28 minutes west 2342 feet; thence north 38 degrees east 1052 feet; thence south 52 degrees east 459.2 feet; thence south 38 degrees west 1052 feet; thence south 4 degrees 28 minutes east 1931 feet; thence south 5 degrees 29 minutes east 2007.2 feet to the Hillsborough Bay; thence westerly along the shore of Hillsborough Bay and the shore of Hillsborough River to the place of beginning, containing 155 and one half acres, more or less. A plat of the reservation and report and notes and survey by Lieutenant James C. Bush, 5th artillery, are enclosed herewith.

"I have the honor to be, sir, with great respect,

"Your obedient servant,

"Geo. W. McCrary, *Secretary of War.*"

This request was approved, and the reservation was made and declared accordingly. The plat, notes and survey referred to in this letter were not introduced in evidence, so that the exact boundaries of the reservation then ordered were not distinctly shown, nor can it be determined from the description in the letter alone whether it included the lands in controversy. In March, 1883, this last reservation was abandoned, and the land again turned over to the Interior Department. Defendant also offered a diagram, certified by the Commissioner of the Land Office, of sections 18 and 19 of township 29, range 19, and section 24 of township 29, range 18, which, as the record recites, "shows the contiguity of the land in question to that portion of the Fort Brooke military reservation last relinquished by the Secretary of War to the Secretary of the Interior." The diagram is not very definite, and it is difficult to determine therefrom the boundaries of either the earlier or later Fort Brooke military reservation. The defendant also offered evidence tending to show that he entered into occupation of the tract in controversy in 1871, and had continued in occupancy ever since.

Mr. Samuel Y. Finley for plaintiff in error.

Mr. C. M. Cooper and *Mr. J. C. Cooper* for defendant in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The ruling of the trial court in sustaining the demurrer to the first equitable plea and refusing to permit the second to be filed presents no question for the consideration of this court, for it was held by the Supreme Court of the State that under the plea of not guilty all the matters of defence set up in these equitable pleas could be offered in evidence and made available; and, in fact, the defendant on the trial did offer his testimony to establish them. So the substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice.

We pass therefore to a consideration of the merits of the case: Was the land within the limits of any military reservation at the time that it was patented? The Supreme Court of the State said in respect to this matter:

"There is doubt whether the documentary evidence offered by the defendant shows that the particular lots of land described in the declaration were embraced in the Fort Brooke reservation when the patent was issued."

It is clear to us that they were not. The description of the reservation asked for in the letter of May 29, 1878, from the Secretary of War to the President, is not of itself sufficient to show whether the land was within or without the limits of such reservation. The plat, notes and survey were not in evidence. But the record recites that the diagram, certified by the Commissioner of the Land Office, "shows the contiguity of the land in question." If contiguous it was not within, and while the diagram is unsatisfactory, yet it tends to support this statement of the record. Again, the testimony of the defendant is that he entered into possession of this land in 1871, which was before the reservation was established, and

continued in such possession until after the restoration in 1883, and this is in accord with the averments in the equitable plea. This also indicates that the land was not included in any government reservation. Further and finally, the plat on file in the General Land Office, and a part of the public records, puts the question at rest and locates the land outside the reservation. Hence, as shown by the testimony and by the public records, this land ever since 1870 has been part of the public lands of the United States, and subject to disposal in accordance with the general land laws. It was unappropriated land within the meaning of the act of 1872.

It being so a part of the public domain, subject to administration by the land department and to disposal in the ordinary way, the question arises whether a party can defend against a patent duly issued therefor upon an entry made in the local land office on the ground that he was in actual possession of the land at the time of the issue of the patent? We are of opinion that he cannot. It appears from the testimony that the defendant, although in occupation of this land, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and in fact did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights. But whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts. The law in reference to this matter was summed up in the case of *Burfenning* v. *Chicago, St. Paul &c. Railway*, 163 U. S. 321, 323, as follows:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether, for instance, a certain tract is

swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reëxamined. *Johnson* v. *Towsley*, 13 Wall. 72; *Smelting Company* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Company*, 106 U. S. 447; *Wright* v. *Roseberry*, 121 U. S. 488; *Heath* v. *Wallace*, 138 U. S. 573; *McCormick* v. *Hayes*, 159 U. S. 332.

"But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. *Smelting Company* v. *Kemp*, 104 U. S. 636, 646; *Wright* v. *Roseberry*, 121 U. S. 488, 519; *Doolan* v. *Carr*, 125 U. S. 618; *Davis' Admr.* v. *Weibbold*, 139 U. S. 507, 529; *Knight* v. *U. S. Land Association*, 142 U. S. 161."

Reference is made in the brief to the act of Congress, of July 5, 1884, c. 214, 23 Stat. 103, concerning the disposal of abandoned and useless military reservations. But obviously that statute can have no significance in this case, for the patent had issued and the title passed from the Government prior to its enactment. We see no reason to doubt that upon the facts in this case the judgment of the Supreme Court of Florida was right, and it is, therefore,

Affirmed.